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IN THE

Supreme Court of the United States

October Term, A. D. 1933.

OKLAHOMA GAS AND ELECTRIC COMPANY, OKLAHOMA NATURAL GAS COMPANY, and its directors, W. T. PHILLIPS, JR., *et al.*,

Appellants,

versus

OKLAHOMA PACKING COMPANY, formerly Wilson & Co., Inc., of Oklahoma; WILSON & CO., INC., of Oklahoma, a Delaware corporation; the CORPORATION COMMISSION OF OKLAHOMA and its members, and J. BERRY KING, Attorney General of Oklahoma,

Appellees.

BRIEF OF APPELLEES.

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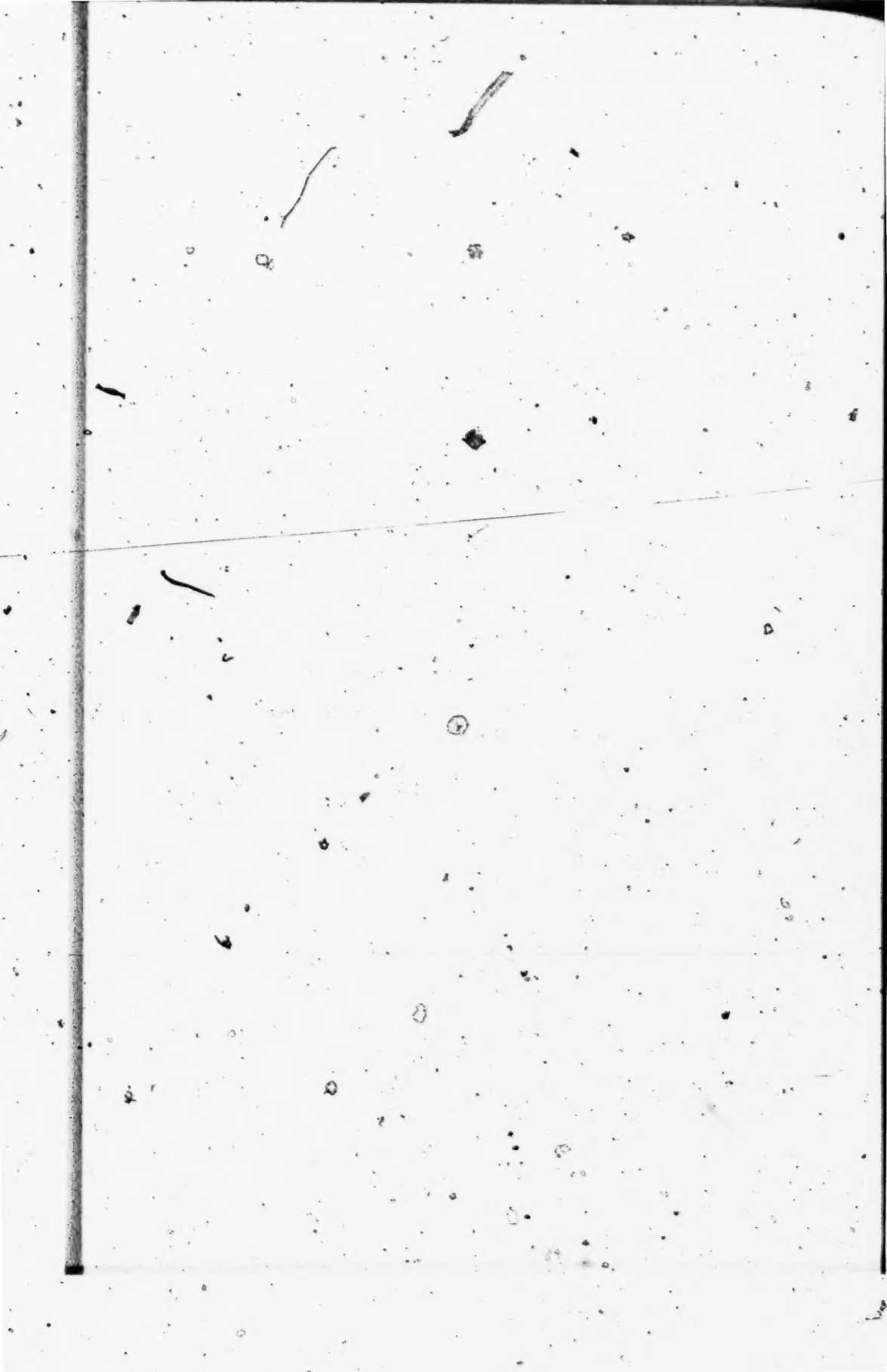

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Oklahoma Gas & Electric Company, et al., v. Oklahoma Packing Company, et al., (unreported) (R. 66).

OPINION ON PETITION FOR REHEARING:

Oklahoma Gas & Electric Company, et al., v. Oklahoma Packing Company, et al., (unreported) (R. 82).

DATE OF JUDGMENT:

Order dismissing bill of complaint, December 12, 1933 (R. 83).

No. 832.

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, A. D. 1933.

OKLAHOMA GAS AND ELECTRIC COMPANY, OKLAHOMA NATURAL GAS COMPANY, and its directors, W. T. PHILLIPS, JR., *et al.*,
Appellants,

versus

OKLAHOMA PACKING COMPANY, formerly Wilson & Co., Inc., of Oklahoma; WILSON & CO., INC., of Oklahoma, a Delaware corporation; the CORPORATION COMMISSION OF OKLAHOMA and its members, and J. BERRY KING, Attorney General of Oklahoma,
Appellees.

BRIEF OF APPELLEES.

STATEMENT OF THE CASE.

Because of certain omissions in the statement of the case by appellants, we supplement such statement as follows:

On September 2, 1924, the Oklahoma Natural Gas Company voluntarily presented its application to the Corporation Commission of Oklahoma for authority to amend its existing schedule of rates on its general system for natural gas for industrial purposes (R. 110). The Corporation Commission on September 16, 1924, adopted, as of September 15, 1924, the rate schedule submitted, and the Oklahoma Natural Gas Company was authorized to put into effect the following schedule of industrial rates for industrial consumers located on its general system: First 100,000 cu. ft. per customer per month thirty-eight cents per 1,000 cu. ft. net. All over 100,000 cu. ft. per customer per month fifteen cents per 1,000 cu. ft. net (R. 112-115).

The appellant, Oklahoma Natural Gas Corporation, after March 1, 1928, furnished gas to Wilson & Co., Inc., for boiler fuel purposes at its established rate of thirty-five cents for the first 100,000 cubic feet per month, and fifteen cents per 1,000 cubic feet, for all in excess thereof, during the months that the total consumption exceeded 15,000,000 cubic feet (R. 73).

The order herein sought to be enjoined became inoperative on March 1, 1928 (while the petition to review was pending in the Supreme Court), when the properties of the Oklahoma Gas and Electric Company were purchased by the Oklahoma Natural Gas Corporation, and new industrial rates were put into effect. There is no suggestion in the record of any intention on the part of any of the public officials of Oklahoma to undertake to impose any statutory penalties for failure to comply with the order while it was in effect. No such statutory penalties could be imposed because the order was legally superseded until it was displaced by the new rates. The only consumer affected by the order is Wilson & Co., Inc. (R. 76, Finding of Fact VII).

The appellee, Wilson & Co., Inc., of Oklahoma, a Delaware corporation, on June 9, 1932, appeared specially and solely for the purpose of objecting to being sued in the Western District of Oklahoma, and moved that the bill of complaint be dismissed as to it, for the reason that the corporation is not an inhabitant of such district but an inhabitant of the State of Delaware, with its principal office in Delaware, and that the proper venue of suits arising under the Constitution and laws of the United States against Wilson & Co., Inc., of Oklahoma, is in the United States District Court of Delaware, and that the sole ground for federal jurisdiction is that this suit arises under and involves the construction and application of the Consti-

tution and laws of the United States (R. 38). The motion of Wilson & Co., Inc., of Oklahoma was overruled by the District Court on November 28, 1932, to which appellee excepted (R. 63). On December 1, 1932, the appellee, Wilson & Co., Inc., of Oklahoma, filed its answer reserving to itself the benefit of its objection to being sued in the Western District of Oklahoma (R. 64).

We desire to point out the following inaccuracies in the statement of appellants:

In paragraph 2 of the statement (Appellants' Brief 3), the appellant states part of the testimony of R. C. Sharp (R. 97) and refers to service by distributing companies in "and near" (8th line of paragraph) various cities and towns in Oklahoma. The record (R. 97) shows that the words "and near" do not appear.

In the second line of the last paragraph on page 15 of appellants' brief, the statement is made that the gas companies took separate "legislative appeals" from the order of the Corporation Commission to the Supreme Court of Oklahoma. The words "legislative capacity" are again used by appellants in line 13, page 16. The record shows only that "appeals" were prayed and allowed, and the word "legislative" is not a true statement (R. 105, Ex. F, and R. 106, Ex. G).

On page 21, appellants state that a permanent injunction was denied, in a written opinion, and appellants' bill dismissed. The record shows that the three judge district court entered an order that the bill of complaint be dismissed for want of equity (R. 83).

APPELLANTS' SPECIFICATIONS OF ERROR.

The appellants set up five specifications of error without any reference to the record to show where the lower court committed the error specified.

An examination of the record shows that the appellants took an exception to the lower Court's order denying their application for an interlocutory injunction (R. 63) and to the order dismissing the bill for want of equity (R. 84). These are the only exceptions taken by appellants upon the trial. The appellants have assigned the dismissal of the bill as error (R. 134, 136, 139) and have included it in the specification of errors in their brief No. I (p. 22). The other specifications of error can be considered only if, and so far as they show that there was error in dismissing the bill for want of equity.

The fifth specification of error is double, in that the order violated the Fourteenth Amendment to the Constitution of the United States, and also that the order impaired a contract between the appellants, in violation of Section 10 of Article I of the Constitution. The second ground, as to impairment of a contract between the appellants, has not been included in any assignment of error filed by any of the appellants.

SUMMARY OF ARGUMENT.

PART I.

The first purpose of the bill of complaint was to enjoin one of the appellees, Wilson & Co., Inc., of Oklahoma, a Delaware corporation, from prosecuting its action at law in the State Court against one of the appellants, Oklahoma Gas and Electric Company, and its surety for damages arising out of conditions broken in supersedeas bonds, and the liability imposed under the Constitution and statutes of Oklahoma.

(*a*) This Court does not have jurisdiction on direct appeals under Section 266, Judicial Code, to review the decision of the District Court, in so far as the purpose of the bill of complaint was to enjoin one of the appellees, Wilson & Co., Inc., of Oklahoma, from prosecuting its action for damages in the State Court against one of the appellants, Oklahoma Gas and Electric Company, and its surety.

Oklahoma Gas & Electric Co. v. *Wilson & Co.*, 146 Okla. 272.

United States v. *John Barth Co.*, 279 U. S. 370.

Gulf States Steel Co. v. *United States*, 287 U. S. 32.

English v. *Severns*, 61 Okla. 184.

Judicial Code, Sections 238 and 266 (28 U. S. C. A. Sections 345 and 380).

Pittsburgh & W. Va. Ry. Co. v. *United States*, 281 U. S. 479.

New York Central Securities Corp. v. *United States*, 287 U. S. 12.

Amazon Petroleum Corp. v. *Railroad Com. of Texas*, 5 Fed. Sup. 633.

(*b*) The District Court did not err in dismissing the bill of complaint as to the appellee, Wilson & Co., Inc., of Oklahoma, a Delaware corporation, which party could not be sued in the Western District of Oklahoma without its consent pursuant to the Venue Statute, Section 51, Judicial Code.

Judicial Code, Section 51 (28 U. S. C. A. § 112).

Shaw v. *Quincy Mining Co.*, 145 U. S. 444.

So. Pac. Co. v. *Denton*, 146 U. S. 202.

St. Louis & S. F. Ry. Co. v. *James*, 161 U. S. 545.

People of Puerto Rico v. *Russell & Co.*, 288 U. S. 476.

Macon Gro. Co. v. *Atlantic Coast Line*, 215 U. S. 501.

Male v. *A. T. & S. F. R. Co.*, 240 U. S. 97.

Geneva Furn. Co. v. *S. Karpen & Bros.*, 238 U. S. 254.

Hurn v. *Oursler*, 289 U. S. 238.

(*c*) The District Court was prohibited by Section 265, Judicial Code, from enjoining the prosecution of the action at law in the State Court.

Judicial Code, Section 265, (28 U. S. C. A. § 379).

Kline, et al. v. *Burke Const. Co.*, 260 U. S. 226.

Grubb v. *Public Utilities Com. of Ohio*, 281 U. S. 470.

(*d*) The appellant, Oklahoma Gas and Electric Company, is in equity with unclean hands, in that it has failed to refund to appellee, Wilson & Co., Inc., of Oklahoma, the excess rate paid by the latter to the former under the conditions in the supersedeas bonds as well as under the Constitution and statutes of Oklahoma.

National Fire Insurance Co. v. *Thompson*, 281 U. S. 331.

Aetna Insurance Co. v. *Hyde*, 34 Fed.(2d) 185.

PART II.

The second purpose of the bill of complaint was to enjoin State officers from enforcing Order No. 3388 of the Corporation Commission of Oklahoma.

(*a*) The District Court did not err in dismissing the bill of complaint as to the Corporation Commission of Oklahoma and the State officers in that there were neither actions nor threatened actions on the part of such officers to enforce Order No. 3388.

Champlin Refining Co. v. *Corporation Comm. of Oklahoma*, 286 U. S. 210.

(*b*) The Supreme Court of Oklahoma, in affirming the order of the Corporation Commission exercised judicial powers, and that decision is *res judicata* of all the questions presented in this case.

Oklahoma Gas and Electric Company v. *Wilson and Company*, 146 Okla. 272.

Prentis v. *Atlantic Coast Line*, 211 U. S. 210.

Keller v. *Potomac Electric Power Co.*, 261 U. S. 428.

Bacon v. *Rutland R. R. Co.*, 232 U. S. 134.

Detroit & M. Ry. Co. v. *Michigan R. R. Comm.*, 235 U. S. 402.

Federal Radio Comm. v. *General Electric Co.*, 281 U. S. 464.

Porter v. *Investors' Syndicate*, 286 U. S. 461.

Federal Radio Comm. v. *Nelson Bros. B. & M. Co.*, 289 U. S. 266.

Aetna Ins. Co. v. *Commonwealth*, ... Va. ....., 169 S. E. 859, decided June 15, 1933.

Sterling Refining Co. v. *Walker*, ... Okla. ....., 25 Pac.(2d) 312, decided Sept. 12, 1933.

PART III.

Reply to Appellants' Propositions.

Merely alleging that the order of the Corporation Commission is unconstitutional does not show that the District Court erred in dismissing the bill for want of equity.

Aetna Insurance Co., et al. v. *Hyde*, 275 U. S. 440.

Boise Artesian H. & C. Water Co. v. *Boise City*, 213 U. S. 276.

Northport Power & Light Co. v. *Hartley*, 283 U. S. 568.

Matthews v. *Rodgers*, 284 U. S. 521.

Reply to Appellants' Point I in Summary of Argument.

The Supreme Court of Oklahoma does not exercise legislative power upon appeals from orders of the Corporation Commission affecting gas companies such as appellants.

Oklahoma Constitution, Art. IX, Section 20.

Oklahoma Constitution, Art. IX, Section 22.

Sterling Ref. Co. v. *Walker*, ... Okla. ....., 25 Pac. (2d) 312.

Oklahoma Constitution, Art. IX, Section 23.

Oklahoma Constitution, Art. IX, Section 34.

Shawnee Gas & Electric Co. v. *Corporation Commission*, 35 Okla. 454.

Oklahoma Statutes, 1931, Secs. 3617-3621.

Oklahoma Natural Gas Co. v. *State*, 75 Okla. 5.

Oklahoma Gas & Electric Co. v. *Wilson & Co.*, 146 Okla. 272.

In re County Commissioners, 22 Okla. 435.

Williams v. *City of Norman*, 85 Okla. 230.

State ex rel. King v. *H. F. Wilcox Oil & Gas Co.*, 162 Okl. 237.

Oklahoma Constitution, Art. IV, Section 1.

Cases to be distinguished:

A. T. & S. F. Ry. Co. v. *State*, 23 Okla. 510.
C. R. I. & P. Ry. Co. v. *State*, 24 Okla. 370.
A. T. & S. F. Ry. Co. v. *Miller*, 28 Okla. 109.
Pioneer T. & T. Co. v. *Bartlesville*, 40 Okla. 583.
Prentis v. *Atlantic Coast Line*, 211 U. S. 210.
Oklahoma Gas & Electric Co. v. *Wilson & Co.*, 54 Fed. (2d) 596.
Oklahoma Natural Gas Co. v. *Russell*, 261 U. S. 290.
City of Poteau v. *American Indian Oil & Gas Co.*, 159 Okla. 240.

Reply to Appellants' Proposition No. I.

The appellant, Oklahoma Gas & Electric Company, had an adequate remedy at law in the State Court.

Matthews v. *Rodgers*, 284 U. S. 521.

Reply to Appellants' Proposition No. II.

Appellants' Proposition No. II does not show that the lower Court committed any error in dismissing the bill of complaint for want of equity.

Northport Power & Light Co. v. *Hartley*, 283 U. S. 568.

Cases distinguished:

Oklahoma Natural Gas Co. v. *Corporation Commission*, 88 Okla. 51.
In re Vance, 115 Okla. 8.

Reply to Appellants' Proposition No. III.

Appellants' Proposition No. III does not show that the lower Court committed any error in dismissing the bill of complaint for want of equity.

Rules of the Supreme Court of the United States, Rule 27, par. 4.

Reply to Appellants' Proposition No. IV.

The Appellants' Proposition No. IV does not show that the lower Court committed any error in dismissing the bill of complaint for want of equity.

Stoody Co. v. *Milk Alloys,* 67 Fed.(2d) 807.
Smart v. *Wright,* 227 Fed. 84.
Childs v. *Williams,* 212 Fed. 151.
Albany P. W. P. Co. v. *John Hoberg Co.,* 109 Fed. 589.
Eureka County Bank v. *Clarke,* 130 Fed. 325.
United States v. *Heinrichs,* 16 Fed.(2d) 112.
Clinton M. & M. Co. v. *Cochran,* 247 Fed. 449.
City of Newark v. *Mills,* 35 Fed.(2d) 110. (Cert. denied, 281 U. S. 722.)
Lewis-Hall Iron Works v. *Blair,* 23 Fed.(2d) 972. (Cert. denied, 277 U. S. 592.)
City of St. Paul v. *Certain Land,* 48 Fed.(2d) 805.
Boise Artesian H. & C. Water Co. v. *Boise City,* 213 U. S. 276.

ARGUMENT.

The appellants brought this suit in the United States District Court for the Western District of Oklahoma. It joined as defendants, Oklahoma Packing Co., an Oklahoma corporation (formerly Wilson & Co., Inc., of Oklahoma), Wilson & Co., Inc., of Oklahoma, a Delaware corporation, the Corporation Commission of Oklahoma, and its members and other state officers. The purpose of this suit, as stated in the bill of complaint, was two-fold: *First,* to enjoin one of the appellees, Wilson & Co., Inc., of Oklahoma, a Delaware corporation, from prosecuting its civil action in the State Court of Oklahoma against one of the appellants, Oklahoma Gas and Electric Company, and its surety, Fidelity and Casualty Company of New York, for damages arising out of the conditions broken in supersedeas bonds and the liability imposed under the Constitution and statutes of Oklahoma as a result of the superseding, pending appeal to the Supreme Court of Oklahoma, of Order No. 3388 of the Corporation Commission of the State, which required the appellant, Oklahoma Natural Gas Company, to furnish gas to Wilson & Co., Inc. at the rates then on file with the Corporation Commission; and, *Second,* to enjoin the Corporation Commission and other state officers from enforcing said Order No. 3388.

We shall separate the argument in this brief into three parts and discuss each of these purposes separately and reply to appellants points. Inasmuch as there is a question of the jurisdiction of this Honorable Court upon this direct appeal from the three judge district court involved in the first purpose, that is, to enjoin the action by a private

party in the State Court, we shall first dispose of this purpose before taking up the second purpose, that is, of enjoining the state officers from enforcing the order of the Corporation Commission of Oklahoma.

PART I.

The first purpose of the bill of complaint was to enjoin one of the appellees, Wilson & Co., Inc., of Oklahoma, a Delaware corporation, from prosecuting its action at law in the State Court against one of the appellants, Oklahoma Gas & Electric Company, and its surety for damages arising out of conditions broken in supersedeas bonds, and the liability imposed under the Constitution and Statutes of Oklahoma.

(a) This Court does not have jurisdiction, on direct appeals under Section 266, Judicial Code, to review the decision of the District Court in so far as the purpose of the bill of complaint was to enjoin one of the appellees, Wilson & Co., Inc., of Oklahoma, from prosecuting its action for damages in the State Court against one of the appellants, Oklahoma Gas & Electric Company, and its surety.

The action in the State Court, sought to be enjoined in this suit, is an action at law to recover the damages suffered by Wilson & Co., Inc., of Oklahoma arising out of the appellant, Oklahoma Gas & Electric Company, having superseded Order No. 3388 of the Corporation Commission pending the appeal to the Supreme Court of Oklahoma. The action in the State Court is based upon the breach of conditions in the supersedeas bonds, given by the Oklahoma Gas & Electric Company, and its surety, and the liability imposed upon that gas company under the Constitution

and laws of the State of Oklahoma to refund the overcharges which the gas company collected from Wilson & Co., Inc. while the order was superseded, pending the appeal to the Supreme Court of Oklahoma.

The supersedeas bonds gave Wilson & Co., Inc. a cause of action separate and distinct from any action based upon the Order No. 3388 of the Corporation Commission, which order was affirmed by the Supreme Court of Oklahoma in *Oklahoma Gas & Electric Co.* v. *Wilson & Co.*, 146 Okla. 272.

This Court had a similar question before it in *United States* v. *John Barth Co., et al.*, 279 U. S. 370, in an action against a principal and surety on a tax abatement bond filed under the revenue acts to supersede or suspend the collection of the tax pending an appeal to the Board of Tax Appeals. The Court, in the opinion by Chief Justice Taft, said, on page 375, as follows:

> "* * * The making of the bond gives the United States a cause of action separate and distinct from an action to collect taxes which it already had."

The decision was followed in *Gulf States Steel Company* v. *United States*, 287 U. S. 32, where the Court said, at page 40:

> "* * * a bond made in such circumstances affords a cause of action separate and distinct from one to collect the tax."

The action in the State Court is a civil action for breach of contract. The Supreme Court of Oklahoma, on appeal from an action against the principal and surety on a supersedeas bond, said, in *English* v. *Severns*, 61 Okla. 184, at page 185, as follows:

> "Defendants are bound by the terms of their undertaking, since an action upon a supersedeas bond is an action upon a contract."

The action in the State Court cannot therefore be construed to be an action by state officers to enforce an order of the Corporation Commission of Oklahoma.

Because of the second purpose of the bill, which sought to enjoin state officers under Section 266, Judicial Code (28 U. S. C. A., Section 380), the District Court, three judges sitting, heard an application for an interlocutory injunction (R. 63) and, likewise, for a permanent injunction upon final hearing (R. 83). This direct appeal from the final order, dismissing the bill of complaint, has been taken under Sections 238 and 266 of the Judicial Code (28 U. S. C. A., Sections 345 and 380). See Appendix p. 66.

The jurisdiction of this Court under Sections 238 and 266 is on direct appeals from orders granting or denying injunctions against state officers, but this Court does not have jurisdiction of direct appeals from decisions of the District Court where injunctions are sought against parties other than the state officers.

This proposition was before this Court in *Pittsburgh & W. Va. Ry. Co.* v. *United States, et al.*, 281 U. S. 479, where a suit by the Pittsburgh Railway Company was instituted in the District Court for Northern Ohio under the Urgent Deficiencies Act, October 22, 1913, c. 32, 38 Stat. 208, 219, 220 (28 U. S. C. A., Section 47) against the Wheeling, the Erie, the Big Four, the Terminal Company, the Building Company, the Interstate Commerce Commission and the United States. The Urgent Deficiencies Act, which is in all material respects analogous to Section 266 of the Judicial Code, provides for the jurisdiction of the United States District Courts, three judges sitting, over suits to enjoin the enforcement of orders of the Interstate Commerce Commission. The bill of complaint showed the purpose of the suit was two-fold: *First*, to enjoin the Wheeling from abandoning its Ontario Street Station and from per-

forming its contracts with the other defendants; *secondly*, to set aside the order of the Interstate Commerce Commission granting the certificate of public convenience and necessity.

This Court then said, on pages 484-486, as follows:

"* * * Separate relief was prayed for accordingly. As against the Wheeling, the prayer was founded on the several grounds advanced before the Commission. As against the United States and the Commission, on the additional ground that the order was based on erroneous conclusions of law, to wit, that the Commission had no jurisdiction to pass on the adequacy of the price to be paid for the land and on the alleged violations of the laws of Ohio; that the Wheeling's directors were competent to act for it in this matter; and that the rental agreed to be paid by the Wheeling for the use of the union terminal facilities was not subject to be increased by the Commission.

"The Pittsburgh moved for an interlocutory injunction. As the bill sought to suspend and set aside an order of the Interstate Commerce Commission, the District Judge called to his assistance two additional judges pursuant to the Urgent Deficiencies Act, October 22, 1913, c. 32, 38 Stat. 208, 219, 220 (28 U. S. C. A., § 47). By consent of the parties, the case was then heard, as upon final hearing; and the court entered a final decree dismissing the bill on the merits as to both classes of relief prayed for. It declared, however, that the questions concerning the alleged violation of Ohio law, the competency of the Wheeling's directors, and the other grounds of attack on the Wheeling's action were not properly before it as a three judge court. But, since diversity of citizenship existed and the District Judge concurred in the judgment, the court passed on them and reserved to appellant the right to sever these issues for purposes of appeal and treat its decision on them as the decision of a single judge. *Pittsburgh & West Virginia*

Ry. Co. v. *United States*, 41 F.(2d) 806. Appellant did not avail itself of this privilege, but prosecuted a direct appeal to this Court from the whole decree. It repeats here the several grounds of attack urged before the District Court. We have no occasion to consider the merits of the controversy. For we are of opinion that appellant had no standing to bring this suit as one to set aside an order of the Commission; and that, in so far as the suit may be treated as one within the general equity jurisdiction of the District Court, we have no jurisdiction on a direct appeal to review its decision.".

Continuing, on page 488:

"Second. The prayer that the contemplated action of the Wheeling should be enjoined because its directors hold office illegally, are faithless to their trust, are acting in violation of the rights of stockholders under the Ohio law, and, hence, that the Wheeling could not legally exercise the authority granted to it by the Commission, was not properly joined in this suit and is not subject to review in this Court on a direct appeal. An application for such relief may not be included in a bill under the Urgent Deficiencies Act to set aside an order of the Interstate Commerce Commission. (Citing cases) It is neither ancillary to nor dependent upon the judgment as to the order. Relief of that character may be had only in a suit invoking the plenary equity jurisdiction of the District Court. Such a suit would be heard in ordinary course by a single judge; and it would be appealable only to the Circuit Court of Appeals. * * *"

This Court in *New York Central Securities Corporation* v. *United States*, 287 U. S. 12, reaffirmed the *Pittsburgh case*, and said, on pages 28-29, as follows:

"Second. Questions as to the alleged breach by the New York Central, as majority stockholder of the Michigan Central, of its fiduciary duty to the appel-

> lant as minority stockholder, in the light of the terms of the indenture under which the voted shares had been pledged to secure bonds, are not properly raised in this suit under the Urgent Deficiencies Act (U. S. Code, tit. 28 § 47) and hence are not open to review on this appeal. *Pittsburgh & West Virginia Railway Co.* v. *United States,* 281 U. S. 479, 488."

The same question was before the United States District Court in *Amazon Petroleum Corporation* v. *Railroad Commission of Texas,* 5 Fed. Sup. 633. This case was brought under Judicial Code, Sec. 266, (28 U. S. C. A. §380), to enjoin the State Railroad Commission from limiting the production of oil in the East Texas oil fields. In that case they sought injunctive relief against the Railroad Commission; in addition, they sought an injunction against agents of the Federal Government to restrain them from enforcing rules and regulations promulgated under the National Recovery Act. The three judge court, in holding that it did not have jurisdiction of the action against the agents of the Federal Government said, page 634:

> "Disposing first, as we must, of the question of jurisdiction, we think it plain that each suit asserts two wholly separate and distinct causes of action. Of one of these actions, that against the state officers, we have jurisdiction. We are without jurisdiction of the other. But for the agreements submitting it to the District Judge alone, we should be obliged to dismiss it. *Horton Mfg. Co.* v. *Hardy Light Co.,* (Tex. Civ. App.) 294 S. W. 320. Under that agreement, instead of dismissing it, we are directing its severance for submission, under such repleading in it, if any, as may be deemed necessary, to the District Judge as a separate and independent suit."

This Court is without jurisdiction upon this appeal, in so far as the appellants sought an injunction against Wilson & Co. from prosecuting the action in the State Court.

(b) The District Court did not err in dismissing the bill of complaint as to the appellee, Wilson & Co., Inc., of Oklahoma, a Delaware corporation, which party could not be sued in the Western District of Oklahoma without its consent pursuant to the Venue Statute, Section 51, Judicial Code.

In the bill of complaint the jurisdiction is founded only on the fact that—

> "* * * this is a suit in equity arising under and involving the construction and application of the constitution and laws of the United States * * *" (R. 4).

The appellee, Wilson & Co., Inc., of Oklahoma, a Delaware corporation, appeared specially, on June 9, 1932, and objected to being sued in the Western District of Oklahoma (R. 38). Its motion to dismiss it from the case was overruled November 28, 1932 (R. 63), and it then filed its answer, on December 1, 1932, reserving to itself the benefit of its objection to being sued in the Western District of Oklahoma (R. 64).

The Venue Statute, Section 51, Judicial Code (28 U. S. C. A. Section 112) reads in part as follows:

> "* * * no civil suit shall be brought in any district court against any person by any original process or proceeding in any other district than that whereof he is an inhabitant; but where the jurisdiction is founded only on the fact that the action is between citizens of different States, suit shall be brought only in the district of the residence of either the plaintiff or the defendant." See Appendix p. 64.

Wilson & Co., Inc., of Oklahoma is a corporation organized and doing business under and by virtue of the laws of the State of Delaware. It is therefore an inhabitant of that State and not of the State of Oklahoma. It is well

settled by this Court that for the purpose of venue a corporation is an inhabitant of the state in which it is incorporated, and it is not an inhabitant of a foreign state in which it conducts business.

Shaw v. *Quincy Mining Co.*, 145 U. S. 444, at page 452.

So. Pac. Co. v. *Denton*, 146 U. S. 202, at page 207.

St. Louis & S. F. Ry. Co. v. *James*, 161 U. S. 545, at pages 562-563.

People of Puerto Rico v. *Russell & Co.*, 288 U. S. 476, at page 479.

It is further firmly established that where jurisdiction of a suit in the United States District Court rests upon a question arising under the federal law, the defendant, under Section 51, Judicial Code, by making seasonable objection to being sued in a district other than his residence, does not waive the objection if the benefits thereof are preserved in his subsequent pleading. *Macon Grocery Co.* v. *Atlantic Coast Line R. R. Co.*, 215 U. S. 501, at pages 503, 508, 510; *Male* v. *Atchison T. & S. F. R. Co.*, 240 U. S. 97, at page 102.

In *Macon Grocery Co.* v. *Atlantic Coast Line R. R. Co.*, 215 U. S. 501, certain shippers, all citizens of Georgia, sued to enjoin railroad corporations, of states other than Georgia, from putting into effect proposed advances in rates on the ground that the rates were the result of a conspiracy which was unlawful at common law and under the statutes of the United States. The various defendants appeared specially and filed pleas to the jurisdiction of the persons, each defendant claiming exemption from being sued in a district of which it was not an inhabitant. Demurrers to the pleas to the jurisdiction were sustained. The defendants, without waiving the benefit of the pleas, jointly demurred to the bill. Without passing on the de-

murrer the Court heard the application for, and granted a temporary injunction. The decree was reversed and the plaintiffs appealed. The defendants, as appellees, raised the question presented in their pleas to jurisdiction.

As to the question whether or not the defendants had waived their pleas, this Court said, on page 508, as follows:

> "The jurisdiction of the Circuit Court not being invoked solely upon the ground of diversity of citizenship, it inevitably follows that, as there was no waiver of the exemption from being sued in the court below, that court was without jurisdiction of the persons of the defendants. * * *"

In conclusion, on page 510, this Court said:

> "The pleas to the jurisdiction of the Circuit Court having been seasonably made, should have been sustained and the bill dismissed, without prejudice, for want of jurisdiction over the persons of the defendants. * * *"

The *Maçon Grocery Company case* was followed in *Male* v. *Atchison T. & S. F. Ry. Co.*, 240 U. S. 97, at page 102.

This Court has further held that jurisdiction as limited and fixed by Congress cannot be enlarged or extended by uniting in a single suit causes of action of which the Court is without jurisdiction with one of which it has jurisdiction. *Geneva Furniture Co.* v. *S. Karpen & Bros.*, 238 U. S. 254, at page 259; *Hurn* v. *Oursler*, 289 U. S. 238, at page 248.

In *Geneva Furniture Co.* v. *S. Karpen & Bros.*, 238 U. S. 254, this Court, on page 259, said:

> "We therefore hold that so much of the bill as charges the defendants with contributory infringement of the plaintiff's letters patent, and seeks relief on that ground, presents a case arising under the

patent laws, of which the district court should have taken jurisdiction.

"But the other portions of the bill stand upon a different footing. The causes of action which they present—those not founded upon an unauthorized making, using, or selling of devices, embodying the inventions of the plaintiff's patents, but resting only upon a breach of contractual obligations—do not arise under the patent laws. (Citing cases.) As to them no Federal court can take jurisdiction of a suit against the West Virginia company without its consent, save in the district of its residence or that of the plaintiff (Judicial Code, § 51); and it hardly needs statement that the jurisdiction as limited and fixed by Congress cannot be enlarged or extended by uniting in a single suit causes of action of which the court is without jurisdiction with one of which it has jurisdiction. Upon this point the rule otherwise prevailing respecting the joinder of causes of action in suits in equity must, of course, yield to the jurisdictional statute. Thus, the West Virginia company's objection, while not good as to the entire bill, was good as to the causes of action not arising under the patent laws. * * *"

The objection of appellee, Wilson & Co., Inc. of Oklahoma, to being sued in the Western District of Oklahoma was not waived. The appellants, by joining this cause of action with a cause of action against the state officers, could not enlarge or extend the jurisdiction of the District Court to this separate cause of action against Wilson & Co., Inc., of Oklahoma.

The District Court did not err, therefore, in dismissing the bill of complaint in so far as the decree related to the appellee, Wilson & Co., Inc., of Oklahoma, a Delaware corporation.

(c) The District Court was prohibited by Section 265, Judicial Code, from enjoining the prosecution of the action in the State Court.

The action by appellee, Wilson & Co., Inc., of Oklahoma, against appellant, Oklahoma Gas & Electric Company, and its surety, was filed in the State Court of Oklahoma County on December 3, 1931. The present suit was filed in the Federal District Court on May 20, 1932, or six months after the action was filed in the State Court. One of the appellants, Oklahoma Gas & Electric Company, is seeking in this suit to enjoin the appellee, Wilson & Co., Inc., from prosecuting its action in the State Court.

It is self-evident that the present suit as well as the action for damages in the State Court are by their very terms and nature proceedings *in personam*.

The Judicial Code, Section 265 (28 U. S. C. A. Section 379) expressly prohibits the Federal District Court from enjoining the action in the State Court in the following words:

> "The writ of injunction shall not be granted by any Court of the United States to stay proceedings in any court of a state, except in cases where such injunction may be authorized by any law relating to proceedings in bankruptcy." (See Appendix p. 66.)

The construction and application of Section 265 of the Judicial Code in the following familiar cases are directly applicable to the present suit:

Kline, et al. v. *Burke Construction Co.*, 260 U. S. 226, at pages 230 and 235-236.

Grubb v. *Public Utilities Commission of Ohio*, 281 U. S. 470, at page 476.

The District Court was prohibited from enjoining the action of Wilson and Company in the State Court, and there was no error in the District Court's decree dismissing the bill for want of equity in so far as the first purpose of the bill was concerned.

(d) The appellant, Oklahoma Gas & Electric Company, is in equity with unclean hands, in that it has failed to refund to appellee, Wilson & Co., Inc., of Oklahoma, the excess rate paid by the latter to the former under the conditions in the supersedeas bonds as well as under the Constitution and Statutes of Oklahoma.

When the appellant, Oklahoma Gas and Electric Company, appealed from Order No. 3388 of the Corporation Commission to the Supreme Court of Oklahoma, it solemnly agreed to refund to Wilson and Company the difference between the old rate, which was charged pending the appeal, and the lower rate, which Wilson and Company would have paid under Order No. 3388, if that order was affirmed by the State Supreme Court. This promise to refund was made as a condition to the appellants' right to supersede the order pending the appeal to the State Supreme Court (R. 105, Ex. F), and took the form of supersedeas bonds in the aggregate sum of $50,000.

The conditions of the bonds were, that, if the Oklahoma Gas and Electric Company should pay to Wilson & Company all amounts collected by the gas company in excess of the rate established by the Order No. 3388 for gas supplied Wilson & Company together with six per cent per annum on any such amount pending the decision of the State Supreme Court on such appeal, in the event that the appeal was affirmed in whole or in part, then the obligation was to be null and void; otherwise to remain in full force and effect (R. 107, Ex. H, and set forth in full R. 52-53).

The Supreme Court of Oklahoma affirmed Order No. 3388 on April 29, 1930. The appellant, Oklahoma Gas and Electric Company, has failed and refused to pay these overcharges and the action at law in the State Court was instituted to recover the damages resulting from the breach of condition in the supersedeas bonds.

It must be further noted that this case and the same constitutional questions as are here presented, have been extensively litigated ten times: *First*, to the Corporation Commission (R. 17); *Second*, to the State Supreme Court, 146 Okla. 272; *Third*, to the Federal District Court in Equity Cause No. 1144, a single Judge sitting (Appellant's Brief 16); *Fourth*, to the Tenth Circuit Court of Appeals, 54 Fed.(2d) 596; *Fifth*, to the Federal District Court, in Equity Cause No. 1144, three Judges sitting, on remand from Circuit Court of Appeals; *Sixth*, to the State Court in the action by Wilson & Co. against appellant, Oklahoma Gas and Electric Company, and its surety to recover damages (R. 27); *Seventh*, to the Federal District Court, in the present suit, three Judges sitting, upon application for an interlocutory injunction (R. 58, 63); *Eighth*, to the Federal District Court in this suit on final hearing (R. 65, 83); *Ninth*, to Supreme Court of Oklahoma a second time, now pending on appeal from a judgment in favor of Wilson & Company in its action for damages (R. 77); and, *Tenth*, to this Court on this appeal.

The appellees respectfully suggest, that under the above facts, the conduct and actions of the appellant are offensive to the dictates of natural justice and objectionable to the conscience of a court of equity.

A similar set of facts was before this Court in *National Fire Insurance Co.* v. *Thompson*, 281 U. S. 331, which affirmed *Aetna Insurance Co.* v. *Hyde*, 34 Fed.(2d) 185.

In that case, separate bills were filed by 155 insurance companies to enjoin the enforcement of an order of the Superintendent of Insurance of Missouri which reduced rates of insurance in that State on the ground that a state statute and the order were repugnant to the Fourteenth Amendment. The case was heard upon an application for an interlocutory injunction, before a three judge court, called under Section 266, Judicial Code. The application was denied without prejudice to renewal upon condition that complainant made a showing that a refund had been made to the assured. The complainants appealed.

The condition as to the refund arose in the following way. Prior to the order involved in the particular suit, the rates had been reduced by a prior order, the enforcement of which the insurance companies sought to enjoin in the State Court. A temporary restraining order was entered in the State Court, and shortly thereafter a stipulation was entered into between the parties. Under this stipulation that suit was dismissed, the rate order rescinded, and a new hearing agreed to with certain conditions attached as to procedure with the view of determining a new rate order. The pertinent part of the stipulation to the case in question was paragraph 4 thereof, which provided that no injunction would be applied for; but pending review and final determination of the case, the rates in force prior to the making of the order were to be collected by the companies and they would "give bond, conditioned and in such amount as the court may direct, to refund to the assured any excess of premiums collected by them if such order * * * be finally sustained by decree or judgment of a court of last resort." The State Supreme Court upheld the order of reduction and this Court declined to interfere 275 U. S. 440. Nothing remained to be done by any one under the stipulation, except for the companies to repay the excess premiums collected to the assureds.

One of the express purposes of the complainants in the Federal District Court, as in the case at bar, was to prevent this repayment. As to this phase of the case the lower court, in denying the application for an interlocutory injunction, said, on page 191 of 34 Fed.(2d), as follows:

> "* * * Here, the complainants are seeking to avoid the effect of the stipulation while retaining every substantial benefit thereof. They should comply with the stipulation and make the refunds required thereby before asking any equitable relief. When that status has been fully established they will be in position to proceed to have their rights determined and protected and not before."

This Court, in affirming the District Court, said, on page 336 of 281 U. S., as follows:

> "But plaintiff insists that the stipulation contains no promise to refund. The pertinent language is quoted above. The stipulation and order constituted the only basis of the companies' rights to continue to collect the higher premiums. When read having regard to the circumstances and context, the quoted language may be construed to be a promise by each company to return to its policy holders the excess charges paid by them pending final determination of the validity of the reduction."

On pages 337-338, this Court continues:

> "* * * The retention of the higher premiums that it obtained by means of the stipulation and the denial of its promise to refund are facts properly to be considered. Courts of equity frequently decline to interfere on behalf of a complainant whose attitude is unconscientious in respect of the matter concerning which it seeks relief. *Deweese* v. *Reinhard*, 165 U. S. 386, 390. While the rule which plaintiff invokes is one of general application, it cannot be said that the lower court erred in withholding relief until plaintiff makes good its promise to refund."

And so in the present case the appellants have made ample effort to exhaust their rights in every possible court and the appellee, Wilson & Company, during all this time has not received the promised refund of excessive charges according to the supersedeas bonds, which refund was due immediately upon the affirmance by the Supreme Court of Oklahoma, of the Corporation Commission's Order No. 3388. Such conduct on the part of appellants with respect to the matter concerning which they seek relief is offensive to the conscience of a court of equity.

The District Court did not err in dismissing the appellants' bill of complaint.

PART II.

The second purpose of the bill of complaint was to enjoin state officers from enforcing Order No. 3388 of the Corporation Commission of Oklahoma.

(a) The District Court did not err in dismissing the bill of complaint as to the Corporation Commission and state officers, in that there were neither actions nor threatened actions on the part of such officers to enforce Order No. 3388.

We shall now take up the second purpose of the bill of complaint to enjoin the Corporation Commission and state officers from enforcing Order No. 3388. The District Court found:

> "In the month of September, 1926, the Oklahoma Natural Gas Corporation purchased the natural gas system of Oklahoma Natural Gas Company and continued thereafter to operate the transmission and distribution systems in Oklahoma. As of March 1, 1928,

the Oklahoma Natural Gas Corporation purchased the natural gas distributing systems of the Oklahoma Gas and Electric Company in the various cities and towns in Oklahoma, including Oklahoma City, and thereafter operated said distributing systems in said cities and towns. The Oklahoma Natural Gas Corporation concurrently, with the commencement of its operations of the gas distributing systems in said cities and towns previously owned and operated by Oklahoma Gas and Electric Company, placed in effect in said cities and towns its industrial gas rates that had theretofore been effective in other cities and towns, and on the general system owned and operated by Oklahoma Natural Gas Corporation. The Oklahoma Natural Gas Corporation after March 1, 1928, furnished gas to Wilson & Company, Inc., for boiler fuel purposes at its established rate of thirty-five cents for the first 100,000 cubic feet per month, and fifteen cents per 1,000 cubic feet, for all in excess thereof, during the months that the total consumption exceeded 15,000,000 cubic feet." (R. 73, Finding I, par. 6.)

"The order herein sought to be enjoined became inoperative on March 1, 1928 (while the petition to review was pending in the Supreme Court), when the properties of the Oklahoma Gas and Electric Company were purchased by the Oklahoma Natural Gas Corporation, and new industrial rates were put into effect. There is no suggestion in the record of any intention on the part of any of the public officials of Oklahoma to undertake to impose any statutory penalties for failure to comply with the order while it was in effect. No such statutory penalties could be imposed because the order was legally superseded until it was displaced by the new rates. The only consumer affected by the order is Wilson & Company, Inc." (R. 76, Finding VII.)

The appellants do not in their assignments of error or specification of error challenge the Court's finding of facts.

The only exceptions taken by appellants in the lower court was to the order denying their application for a temporary injunction (R. 63) and to the order dismissing the bill of complaint for want of equity (R. 84).

As there was no threatened action by the state officers alleged in the bill of complaint (R. 1) or found by the Court (R. 76, Finding VII) there was no ground for an injunction against the state officers. In *Champlin Refining Co.* v. *Corporation Commission of Oklahoma*, 286 U. S. 210, the lower court had declared the penal sections of the statute there before the Court invalid. This Court said on pages 237-238, as follows:

> "Defendants insist that no question concerning the validity of section 8 was before the court.
>
> "We do not find any direct or definite allegation in the record that defendants have threatened or are about to cause plaintiff to be prosecuted under section 8. The court found that no prosecution had been commenced against plaintiff, its officers, or employees, under that section. There is no finding, or evidence sufficient to require one, that any such prosecution was imminent or contemplated. And the opinion states, in substance, that section 9 was the only provision of the act as a penal statute that was before the court.
>
> "Equity jurisdiction will be exercised to enjoin the threatened enforcement of a state law which contravenes the Federal Constitution whenever it is essential in order effectually to protect property rights and the rights of persons against injuries otherwise irremediable; and in such a case a person, who as an officer of the state is clothed with the duty of enforcing its laws and who threatens and is about to commence proceedings, either civil or criminal, to enforce such a law against parties affected, may be enjoined from such action by a federal court of equity. *Terrace* v. *Thompson*, 263 U. S. 197, 214, and cases cited. The burden was upon plaintiff seeking to invoke that rule definitely to show that, in order to protect its prop-

erty rights, it was necessary to restrain defendants from enforcing section 8. Indeed the record before us indicates that plaintiff did not show that its rights were directly affected by any danger of prosecution under section 8, and therefore had no standing to invoke equity jurisdiction against its enforcement. *Oliver Iron Co.* v. *Lord, supra,* 262 U. S. 180, 181; *Massachusetts* v. *Mellon,* 262 U. S. 447, 488; *Aetna Insurance Co.* v. *Hyde,* 275 U. S. 440, 446 *et seq.* Undoubtedly section 8, if invalid, may be severed from other parts of the act without affecting the provisions under which the prorations were made. Ohio Tax Cases, 232 U. S. 576, 594. It follows that the lower court erred in passing upon the validity of that section, and the decree will be modified to declare that no question as to section 8 was before the court."

The state officers have taken no action and have not threatened to take any action against the appellants. The order of the Corporation Commission was superseded pending the appeal. While the appeal was pending in the Supreme Court of Oklahoma appellant, Oklahoma Natural Gas Corporation, began supplying gas to Wilson & Co. (R. 73). This was on March 1, 1928, more than four years before the filing of the bill of complaint in the case at bar.

There was no equity in the bill of complaint and the Court committed no error in dismissing the bill for want of equity.

(b) The Supreme Court of Oklahoma in affirming the order of the Corporation Commission exercised only judicial powers and that decision is res judicata of all of the questions presented in this case.

The opinion of the Supreme Court upon the appeal from the Corporation Commission was introduced in evidence upon the trial. Since it appears in the official volume of

the Oklahoma Supreme Court Reports, *Oklahoma Gas and Electric Company* v. *Wilson & Co.*, 146 Okla. 272, and also 288 Pac. 316, it has not been copied in the printed record (R. 108).

The Supreme Court of Oklahoma, upon the appeal, said, on page 277, as follows:

"Assignment of Errors.

"Defendants have assigned 15 different errors. Both have wisely suggested and have combined and presented said errors under two heads, viz.:

"'(1) The order of the Commission is not supported by the evidence, and is contrary to law.

"'(2) Said order is violative of section 7, Art. 2 of the Constitution of Oklahoma, and of the Fourteenth Amendment to the Constitution of the United States.'

"Defendants aver in their first assignment of error:

"'That the order of the Commission is not supported by the evidence.'

"We think, after a careful study of the evidence and the findings of facts by the Commission as set out above, the evidence is quite sufficient to sustain said findings, and to warrant the Commission in making the order complained of, and that any further discussion as to the sufficiency of the evidence is unnecessary.

"In the case of *St. Louis & S. F. R. Co.* v. *Williams*, 25 Okla. 662, 107 Pac. 428, this court held:

"'Under Constitution, Art. 9, sec. 22, providing a *prima facie* presumption in favor of findings of fact of the Corporation Commission, such findings will not be disturbed by the Supreme Court when supported by evidence.'

"It will be observed (except as to the facts) that **the two errors assigned both relate to the law of the case,** and may be discussed under two heads, namely:

"'(1) Is the Corporation Commission clothed with power to make the order complained of?

> "'(2) Is the order made violative of section 7, Art. 2 of the Constitution of Oklahoma, and to the Fourteenth Amendment to the Constitution of the United States?'"

The appeal, as the Court said, presented only questions of law. The Supreme Court of Oklahoma was deciding a judicial question and the proceedings in the Supreme Court of Oklahoma were judicial in character.

In *Prentis* v. *Atlantic Coast Line Co.*, 211 U. S. 210, this Court said, at page 226:

> "A judicial inquiry investigates, declares, and enforces liabilities as they stand on present or past facts and under laws supposed already to exist. That is the purpose and end. Legislation, on the other hand, looks to the future and changes existing conditions by making a new rule, to be applied thereafter to all or some part of those subject to its power. The establishment of a rate is the making of a rule for the future, and therefore is an act legislative, not judicial, in kind, as seems to be recognized by the supreme court of appeals. (Citing cases.)
>
> "Proceedings legislative in nature are not proceedings in a court, within the meaning of Rev. Stat. § 720, no matter what may be the general or dominant character of the body in which they may take place. (Citing case.) That question depends not upon the character of the body, but upon the character of the proceedings. * * *"

This rule was reaffirmed by this Court in *Keller* v. *Potomac Electric Power Co.*, 261 U. S. 428, at page 440.

Applying this test to the proceedings in the Supreme Court of Oklahoma the question is this: Was the proceeding in the Supreme Court of Oklahoma of such a character that the Supreme Court was called upon to make a

new rule to be applied thereafter? The answer must be that the proceeding in the Supreme Court of Oklahoma was not of such character as to call upon the Supreme Court to make "a new rule to be applied thereafter." The character of the proceeding was such as to call upon the Supreme Court of Oklahoma to declare the liabilities of the parties under laws (the order of the Corporation Commission) supposed already to exist. The character of the proceeding in the Supreme Court was the same as in any case in that court where the constitutionality of a statute or law is challenged. The law challenged was the order of the Corporation Commission. It had completed the legislative proceedings when it entered its order requiring Oklahoma Natural Gas Company to furnish gas to Wilson & Co., which was a new rule for the future. The proceeding in the Supreme Court of Oklahoma to test the validity and constitutionality of the order was judicial.

In *Keller* v. *Potomac Electric Power Co.*, 261 U. S. 428, at page 440, this Court in testing the power of the Court upon such appeals, said:

> "* * * has it the power, in this equitable proceeding to review the exercise of discretion by the Commission and itself raise or lower valuations, rates, or restrict or expand orders as to service? Has it the power to make the order the Commission should have made? If it has, then the court is to exercise legislative power, in that it will be laying down new rules, to change present conditions and to guide future action, and is not confined to definition and protection of existing rights."

This Court has consistently followed the rule that the Court is acting in a legislative capacity if it has power to substitute for the order of the Commission the order

that it, upon a review of the record, determines that the Commission should have entered.

Prentis v. *Atlantic Coast Line*, 211 U. S. 210.
Bacon v. *Rutland R. R. Co.*, 232 U. S. 134.
Detroit & Mackinac Ry. Co. v. *Michigan R. R. Com.*, 235 U. S. 402.
Keller v. *Potomac Electric Power Co.*, 261 U. S. 428.
Federal Radio Com. v. *General Electric Co.*, 281 U. S. 464.
Porter v. *Investors Syndicate*, 286 U. S. 461.
Federal Radio Com. v. *Nelson Bros. B. & M. Co.*, 289 U. S. 266.

The cases also hold that if the Court's power is limited to setting aside a decision of the Commission, where arbitrary or unreasonable, and hence violative of constitutional rights, the Court exercises only judicial functions.

In *Federal Radio Com.* v. *Nelson Bros. B. & M. Co.*, 289 U. S. 266, this Court, in laying down a most comprehensive definition of the judicial powers of the Court in such cases, said, at pages 275-276, as follows:

> "* * * That review is now expressly limited to 'questions of law' and it is provided 'that findings of fact by the commission, if supported by substantial evidence, shall be conclusive unless it shall clearly appear that the findings of the commission are arbitrary or capricious.' This limitation is in sharp contrast with the previous grant of authority. No longer is the court entitled to revise the commission's decision and to enter such judgment as the court may think just. The limitation manifestly demands judicial, as distinguished from administrative, review. Questions of law form the appropriate subject of judicial determinations. Dealing with activities admittedly within its regulatory power, the Congress established the commission as its

instrumentality to provide continuous and expert supervision and to exercise the administrative judgment essential in applying legislative standards to a host of instances. These standards the Congress prescribed. The powers of the commission were defined, and definition is limitation. Whether the commission applies the legislative standards validly set up, whether it acts within the authority conferred or goes beyond it, whether its proceedings satisfy the pertinent demands of due process, whether, in short, there is compliance with the legal requirements which fix the province of the commission and govern its action, are appropriate questions for judicial decision. These are questions of law upon which the court is to pass. The provision that the commission's findings of fact, if supported by substantial evidence, shall be conclusive unless it clearly appears that the findings are arbitrary or capricious, cannot be regarded as an attempt to vest in the court an authority to revise the action of the commission from an administrative standpoint and to make an administrative judgment. A finding without substantial evidence to support it—an arbitrary or capricious finding—does violence to the law. It is without the sanction of the authority conferred. And an inquiry into the facts before the commission, in order to ascertain whether its findings are thus vitiated belongs to the judicial province and does not trench upon, or involve the exercise of, administrative authority. Such an examination is not concerned with the weight of evidence or with the wisdom or expediency of the administrative action. (Citing cases.)

"If the questions of law thus presented were brought before the court by suit to restrain the enforcement of an invalid administrative order, there could be no question as to the judicial character of the proceeding. But that character is not altered by the mere fact that remedy is afforded by appeal. The controlling question is whether the function to be exercised by the court is a judicial function, and, if so, it may be

exercised on an authorized appeal from the decision of an administrative body. We must not 'be misled by a name, but look to the substance and intent of the proceeding.' (Citing cases.) 'It is not important,' we said in *Old Colony Trust Co. v. Commissioner, supra,* 'whether such a proceeding was originally begun by an administrative or executive determination, if, when it comes to the court, whether legislative or constitutional, it calls for the exercise of only the judicial power of the court upon which jurisdiction has been conferred by law.' Nor is it necessary that the proceeding to be judicial should be one entirely *de novo.* When on the appeal, as here provided, the parties come before the Court of Appeals to obtain its decision upon the legal question whether the commission has acted within the limits of its authority, and to have their rights, as established by law, determined accordingly, there is a case or controversy which is the appropriate subject of the exercise of judicial power."

The Supreme Court of Appeals of Virginia in *Aetna Ins. Co.* v. *Commonwealth,* ..... Va. ....., 169 S. E. 859, decided June 15, 1933, has in concise and cogent language stated the power of the Court upon judicial review on page 867 as follows:

"* * * in reviewing the action of the commission in framing the insurance rates here involved, this court will not disturb the action of the commission unless it appears that the commission has exceeded its constitutional or statutory powers; or that its action has resulted from an unreasonable exercise of its authority; or that it is based upon a mistake of law, or is contrary to the evidence or without evidence to support it; or, finally, that the rate fixed is so low as to amount to confiscation and deprive the regulatees of their property without due process of law."

The Supreme Court of Oklahoma has in *Sterling Ref. Co.* v. *Walker*, ... Okla. ....., 25 Pac.(2d) 312, decided September 12, 1933, said, on page 318, as follows:

> "* * * An examination of the foregoing statutory provision discloses that they confer upon this court two classes of powers which may be exercised on appeal. They provide that the orders may be reviewed for the purpose of determining their validity, reasonableness, and justice. The power thus conferred is essentially judicial, and is a proper and salutary grant of authority to the judiciary. They also undertake to vest upon this court the power to promulgate such rules or orders as the court may see fit in lieu of the orders of the commission. The exercise of this latter power by this court would be an encroachment upon the legislative and administrative departments of the government."

Under these definitions of the judicial and legislative powers of the courts the review of the order of the Corporation Commission by the Supreme Court of Oklahoma was judicial in character. The appellants invoked this judicial power of the State Supreme Court to determine precisely the question that is presented by their bill of complaint, viz., that the order violates the Fourteenth Amendment to the Constitution of the United States. They cannot now be heard to deny that the Supreme Court of Oklahoma had power or jurisdiction to judicially determine this question of law.

The character of the proceeding in the Supreme Court of Oklahoma, upon appeal from the order of the Corporation Commission, being judicial in character, the decision is *res judicata* of all questions presented to the lower court. The lower court committed no error in dismissing the bill of complaint for want of equity.

PART III.

REPLY TO APPELLANTS' PROPOSITIONS.

Merely alleging that the order of the Corporation Commission is unconstitutional does not show that the lower court erred in dismissing the bill of complaint for want of equity.

It should be noted at the outset, that the only exceptions taken to rulings of the trial court are, *first*, to the order denying the interlocutory injunction (R. 63), and, *second*, to the order dismissing the bill of complaint for want of equity (R. 84). The dismissal of the bill of complaint has been assigned generally as the first error by the respective appellants (R. 134, 136, 139), and, likewise, as the first point in their specification of errors. This assigned error does not appear either in the summary of, or the four propositions of, their argument.

The appellants have failed to allege in their bill of complaint (R. 1) any facts that would entitle them to any relief in a court of equity. In neither their summary nor their argument, have the appellants shown that they are entitled to equitable relief. They have failed further to point out wherein the District Court erred in dismissing their bill of complaint for want of equity.

The propositions appearing in the appellants' summary and argument are as follows:

1. The appeal to the Supreme Court of Oklahoma was legislative in character (Appellants' Brief 23).
2. The appellant, Oklahoma Gas & Electric Company, did not have an adequate remedy at law by pleading the invalidity of the order in the suit in the State Court (Appellants' Brief 30).

3. The order of the Corporation Commission required the appellant, Oklahoma Natural Gas Company, to perform a public service which had never been professed or undertaken by it, and to take business from the other appellant, and is therefore repugnant to the Fourteenth Amendment (Appellants' Brief 26, 43).
4. The order impaired the obligation of a contract between appellants in violation of Section 10 of Article I of the Constitution of the United States (Appellants' Brief 27, 61).
5. The Oklahoma Natural Gas Company had sufficient interest in the controversy to maintain the suit (Appellants' Brief 29, 63).

The foregoing Point 2 of appellants affects only one appellant, Oklahoma Gas & Electric Company, and one appellee, Wilson & Co., and we have shown under Point I (*a*) of this brief that this Court does not have jurisdiction of that question upon this direct appeal from the District Court. We have shown under Point I (*b*) of this brief that the venue was improperly laid in the Western District of Oklahoma. We have shown under Point I (*c*) of this brief that the District Court cannot enjoin an action in the State Court. We have shown under Point I (*d*) that the appellant, Oklahoma Gas & Electric Co., was in equity with unclean hands.

If we should assume for the purposes of argument that the remaining points in appellants' brief were established, there is still no error committed by the District Court in dismissing the bill for want of equity. The reason being, that the mere alleging that an order of the State Commission is unconstitutional is not sufficient to give a court

of equity jurisdiction to issue an injunction, which this Court has held in:

Aetna Insurance Co. v. *Hyde,* 275 U. S. 440, at page 447.

Boise Artesian Hot & Cold Water Co. v. *Boise City,* 213 U. S. 276, at p. 282.

Northport Power & Light Co. v. *Hartley,* 283 U. S. 568, at p. 569.

Matthews v. *Rodgers,* 284 U. S. 521, at pp. 525-526.

The appellants have failed to show that the lower court erred in dismissing the bill of complaint for want of equity.

We shall now take up each of the appellants' points and propositions for further discussion.

REPLY TO APPELLANTS' POINT I IN SUMMARY OF ARGUMENT.

The Supreme Court of Oklahoma does not exercise legislative powers upon appeals from orders of the Corporation Commission affecting gas companies such as appellants.

The Constitution of Oklahoma, like that of Virginia, provides for appeals from orders of the Corporation Commission affecting transportation and transmission companies direct to the Supreme Court of the State (Okla. Const. Art. IX, Sec. 20). Upon such appeals from orders affecting transportation and transmission companies the State Constitution (Art. IX, Sec. 22) provides:

> "* * * The Supreme Court shall have jurisdiction, on such appeal, to consider and determine the reasonableness and justness of the action of the Commission appealed from, as well as any other matter arising under such appeal * * *."

This power is judicial in character under the decisions of this Court, and under the decision of the Supreme Court of Oklahoma in *Sterling Ref. Co.* v. *Walker,* ..... Okla. ....., 25 Pac.(2d) 312.

The State Constitution (Art. IX, Sec. 23) also provides, upon such appeals, as follows:

> "Whenever the court, upon appeal, shall reverse an order of the Commission affecting the rates, charges, or the classification of traffic of any transportation or transmission company, it shall, at the same time, substitute therefor such orders as, in its opinion, the Commission should have made at the time of entering the order appealed from; otherwise the reversal order shall not be valid * * *."

This power to enter the order that the Commission should have entered is legislative in character under the decisions of this Court and under *Sterling Ref. Co.* v. *Walker,* ..... Okla. ....., 25 Pac.(2d) 312. This legislative power to enter the order that the Commission should have entered is by the express language of the Constitution limited to legislative orders of the Corporation Commission affecting "Transportation and Transmission Companies." Transportation and transmission companies are defined in the Oklahoma Constitution (Art. IX, Sec. 34) as follows:

> "* * * the term 'transportation company' shall include any company, corporation, trustee, receiver, or any other person owning, leasing or operating for hire, a railroad, street railway, canal, steam boat line, and also any freight car company, car association, express company, sleeping car company, car corporation, or company, trustee, or person in any way engaged in such business as a common carrier over a route acquired in whole or in part under the right of eminent domain, or under any grant from the government of the United States; * * * the term 'transmission company' shall

include any company, receiver or other person, owning, leasing, or operating for hire any telegraph or telephone line; * * *'' (See Appendix p. 60.)

The Court held in *Shawnee Gas & Electric Co.* v. *Corporation Commission,* 35 Okla. 454, that Section 18 of Article IX of the Constitution did not give the Corporation Commission jurisdiction over gas companies. The Court quoted Section 18 of Article IX and then said, at page 457, as follows:

> ''* * * it had no reference to gas companies and hence vested the Corporation Commission with no jurisdiction over petitioner in the matter of regulating its rates, or for any other purpose. This is for the reason that petitioner was neither a transportation nor a transmission company within the definition of such companies laid down in Article 9, Sec. 34.''

After quoting from an unreported opinion of Hayes, J., the Court, in the concluding paragraph of that opinion said:

> ''From all of which we conclude that none of the provisions, *supra,* confer upon the Corporation Commission power to make the order, and for that reason the same is void.''

The legislature of Oklahoma, recognizing the lack of jurisdiction of the Corporation Commission over public utilities other than ''transportation and transmission companies,'' passed an Act effective March 25, 1913 (Chap. 93, Sess. L. 1913; Sections 3617-3621, Okla. Stat. 1931, See Appendix p. 61), which gave the Corporation Commission jurisdiction over gas companies, and the Court so held in *Oklahoma Natural Gas Co.* v. *State, et al.,* 75 Okla. 5, at page 7, where it is said as follows:

> ''* * * Jurisdiction over gas utilities was not included in that conferred upon the commission by section 18, art. 9, Constitution, relating to transportation

and transmission companies. *Shawnee Gas & Elec. Co.* v. *Corporation Commission,* 35 Okla. 454, 130 Pac. 127; *City of Pawhuska* v. *Pawhuska O. & G. Co., supra.* But all the powers and duties specified in the Constitution as to transportation and transmission companies, and others in addition thereto, were conferred over gas and other public utilities by chapter 93, Sess. Laws 1913. *Muskogee G. & E. Co.* v. *State, et al., supra.*''

Thus the origin of the jurisdiction of the Corporation Commission over ''gas companies'' is found in Chapter 93 of the Session Laws of 1913 (Secs. 3617-3621, Okla. Stat. 1931) and not in Article IX of the Constitution of Oklahoma.

Section 1 of said Act (Sec. 3617, Okla. Stat. 1931) defines ''Public Utilities'' to include:

> ''Every corporation * * * that now or may hereafter * * * own, operate or manage any plant or equipment * * * for the production, transmission, delivery or furnishing of heat or light with gas.''

Section 2 of the said Act (Sec. 3618, Okla. Stat. 1931) provides as follows:

> ''The Commission shall have general supervision over all public utilities, with power to fix and establish rates and to prescribe rules, requirements, and regulations, affecting their services, operations, and the management and conduct of their business; shall enquire into the management of the business thereof, and the method in which same is conducted. * * *''

The power here conferred upon the Corporation Commission is to make new rules to thereafter apply to gas companies and is therefore a legislative power.

Section 5 of the 1913 Act (Sec. 3621, Okla. Stat. 1931) provides:

> "* * * any public utility, corporation, association, company, individual, their trustees, lessees, or receivers, successors, or assigns may appeal from any order or finding or judgment of the Corporation Commission as provided by law in cases tried and heard before said Commission or transportation and transmission companies."

The appeal from the Corporation Commission's Order No. 3388 to the Supreme Court of Oklahoma, 146 Okla. 272, was taken under this section of the statute. This statute has incorporated, by reference, the judicial powers found in the State Constitution (Art. IX, Sec. 22), *supra,* and these appellants invoked this judicial power and only this judicial power, upon that appeal. One of the questions, specifically presented to the Supreme Court of Oklahoma upon that appeal was that the Order No. 3388 was violative of the Fourteenth Amendment to the Constitution of the United States. The Supreme Court of Oklahoma, in the exercise of its judicial functions, held that the order did not violate the Fourteenth Amendment. The decision of the Supreme Court of Oklahoma is *res judicata* of all judicial questions affecting the validity of said order.

It may be contended that the statute (Sec. 3621, Okla. Stat. 1931) conferred the legislative power found in the State Constitution (Art. IX, Sec. 23) to reverse the order of the Corporation Commission and to "substitute therefor such order as, in its opinion, the Commission should have made at the time of entering the order appealed from."

This construction of the statute would confer legislative power upon the Supreme Court of the State. The Supreme Court of Oklahoma has held that the legislature cannot

delegate legislative power to the Supreme Court of Oklahoma.

In re County Commissioners of Counties Comprising Seventh Judicial District, 22 Okla. 435, at pages 437, 446 and 451.

Williams v. *City of Norman,* 85 Okla. 230, at page 236.

State ex rel. King v. *H. F. Wilcox Oil & Gas Co.,* 162 Okla. 237, at page 239.

Sterling Ref. Co. v. *Walker,* ..... Okla. ....., 25 Pac. (2d) 312, at page 320.

The Supreme Court of Oklahoma based its decisions upon the State Constitution, Art. IV, Sec. 1, which provides, as follows:

> "The powers of the government of the State of Oklahoma shall be divided into three separate departments: The Legislative, Executive, and Judicial; and except as provided in this Constitution, the Legislative, Executive, and Judicial departments of government shall be separate and distinct, and neither shall exercise the powers properly belonging to either of the other."

Cases to be distinguished:

In considering this subject as to the powers of the Supreme Court of Oklahoma upon appeals, we must first consider the powers as they are fixed in the Constitution of Oklahoma. The general powers of the Supreme Court are set forth in Section 2, Article VII of the Constitution, (See Appendix p. 59) and the special powers are found in Sections 20, 21, 22, and 23 of Article IX of that instrument. These special powers appearing in Article IX are expressly limited to orders of the Commission affecting "transportation and transmission companies" only.

The legislature, in Section 2 of the Act of 1913 (Sec. 3618, Okla. Stat., 1931), specifically enumerated the powers of the Corporation Commission over public utilities such as gas companies, but when it came to Section 5 of the Act of 1913 (Sec. 3621, Okla. Stat., 1931) it did not enumerate the powers that the Supreme Court was to exercise upon appeals from such orders, and simply provided that persons affected:

> "May appeal from any order or finding or judgment of the Corporation Commission as provided by law in cases tried and heard before said Commission of transportation and transmission companies."

The law that is here incorporated by reference into the statute is found in Sections 20, 21, 22, and 23 of Article IX of the Constitution. The problem of finding these powers, which the legislature has delegated to the Supreme Court, has increased the difficulties of clearly enumerating the powers of the Supreme Court of Oklahoma upon appeals from orders of the Commission affecting gas companies. The result has been that it is very easy to lose sight of the fact that the Supreme Court was exercising a power delegated to it by the legislature and not exercising a power conferred upon the Supreme Court by the Constitution.

In approaching the question of distinguishing cases that might at first blush appear to be in disaccord with rules herein set forth, the following distinctions, therefore must be kept clearly in mind:

1. The power which the Supreme Court exercises on appeals from orders of the Corporation Commission affecting "transportation and transmission companies" is conferred upon the Supreme Court of Oklahoma by the Constitution itself in Sections 20, 21, 22 and 23 of Article IX; and

2. The power which the Supreme Court of Oklahoma exercises on appeals from orders of the Corporation Commission affecting other public utilities, such as "gas companies," is conferred upon that Court by an act of the legislature (Secs. 3621, Okla. Stat., 1931) and not by the Constitution; and

3. The general powers of the Supreme Court of Oklahoma are set forth in Section 2, Article VII of the Constitution of Oklahoma, with the express limitation in Section 1, Article IV of the Constitution that "*except as provided in this Constitution,* the Legislative, Executive, and Judicial departments of government shall be separate and distinct; *and neither shall exercise the powers properly belonging to either of the others.*" The powers conferred upon the Supreme Court of Oklahoma in Sections 20, 22, and 23 of Article IX of the Constitution upon appeals from orders of the Commission affecting transportation and transmission companies are an exception to the constitutional prohibition in Section 1, Article IV against conferring legislative power upon the Supreme Court.

These are the fundamental distinctions that separate the appeals from orders of the Corporation Commission affecting transportation and transmission companies from all other appeals from the Corporation Commission. The Supreme Court of Oklahoma kept this clear distinction in *Sterling Refining Co.* v. *Walker,* ..... Okla. ....., 25 Pac.(2d) 312.

The rule announced in the following cases, that the Supreme Court of Oklahoma exercised legislative powers upon appeals from the Corporation Commission, was applicable to appeals from the Corporation Commission affecting "transportation and transmission companies" un-

der the constitutional powers of the Supreme Court and are thus distinguished from cases affecting gas companies.

A. T. & S. F. Ry. Co. v. *State,* 23 Okla. 510.
C. R. I. & P. Ry. Co. v. *State,* 24 Okla. 370.
A. T. & S. F. Ry. Co. v. *Miller,* 28 Okla. 109.
Pioneer T. & T. Co. v. *Bartlesville,* 40 Okla. 583.
Prentis v. *Atlantic Coast Line Co.,* 211 U. S. 210.

In the following cases dealing with the powers of the Supreme Court of Oklahoma in appeals from the Corporation Commission affecting gas companies the Courts have fallen into error and followed the cases of appeals from the Corporation Commission affecting transportation and transmission companies. The authorities cited most frequently in the following cases have been the cases last above mentioned.

In *Oklahoma Gas & Electric Co.* v. *Wilson & Co., Inc.,* 54 Fed.(2d) 596, the Circuit Court of Appeals followed all of the transportation and transmission company cases last above cited and failed to note that in those cases the power exercised by the Supreme Court in appeals from orders of the Corporation Commission is a constitutional power and not a statutory power. The Court also cited *Oklahoma Natural Gas Co.* v. *Russell,* 261 U. S. 290, and when we examine the opinion of the United States Supreme Court in the *Russell case* we find that the Court there assumed that the powers of the State Supreme Court in gas company appeals was the same constitutional power that applied in the Oklahoma and Virginia Constitution to transportation and transmission companies and cited and followed *Prentis* v. *Atlantic Coast Line Co., supra.*

All of the above cases were cited by the Supreme Court of Oklahoma in *City of Poteau* v. *American Indian Oil & Gas Co.,* 159 Okla. 240, and the Court proceeded to decide

the case upon the theory that the Supreme Court of Oklahoma derived its power from the Constitution and assumed that its power in cases of appeals from orders of the Corporation Commission affecting gas companies were constitutional and as broad as the powers of the Supreme Court of Oklahoma in such appeals affecting transportation and transmission companies. There is nothing in the opinion to indicate that the question as to the power of the legislature to delegate power to the Supreme Court to fix rates (a legislative power), was raised or argued in that case. Pending application for a rehearing it was stipulated that that Court could fix a rate for the future, and from this it would appear that all the parties in that appeal conceded that the Supreme Court of Oklahoma had the power to fix rates. In any event, the Court did not hold in that case that the legislature could delegate to that Court power to fix rates for gas companies and there is nothing in the *Poteau case* that is in any way in conflict with what this Court said in *Sterling Ref. Co.* v. *Walker, supra,* to the effect that the legislature could not delegate this rate making power (legislative power) to the Supreme Court.

These cases are all cited by the appellants in the summary of argument (p. 23) of their brief.

In none of these cases has the Supreme Court of Oklahoma construed the statute (Sec. 3621, Okla. Stat. 1931) as conferring legislative power upon the Supreme Court of Oklahoma to substitute its own order for the order of the Corporation Commission.

The Supreme Court of Oklahoma had power to review and did review the order of the Corporation Commission in a judicial capacity and held that the order did not violate the Fourteenth Amendment to the Constitution of the United States. This judicial decision of the Supreme Court of Oklahoma is *res judicata* of all the questions presented

in the case at bar. *Oklahoma Gas & Electric Company* v. *Wilson and Company*, 146 Okla. 272.

The lower court did not err in dismissing the bill of complaint for want of equity.

REPLY TO APPELLANTS' PROPOSITION NO. I.

The appellant, Oklahoma Gas and Electric Company, had an adequate remedy at law in the State Court.

The appellants contend that the lower court erred in holding that Oklahoma Gas & Electric Co. had an adequate remedy at law by pleading the invalidity of the order of the Corporation Commission in the suit instituted in the State Court. Appellants argue that the equity jurisdiction of the Federal Court is not ousted where appellants have no adequate remedy at law in the Federal Courts.

As to this contention, this Court said in *Matthews* v. *Rodgers*, 284 U. S. 521, at page 526:

> "If the remedy at law is plain, adequate, and complete, the aggrieved party is left to that remedy in the state courts, from which the cause may be brought to this Court for review if any federal question be involved, Jud. Code § 237 (28 U. S. C. A § 344), or to his suit at law in the federal courts if the essential elements of federal jurisdiction are present."

This answers the appellants' argument that they must have an adequate remedy at law in the Federal Courts.

We shall not further argue this point, because we have shown under Part I (*a*) of this brief that this Court does not have jurisdiction of this question upon direct appeal from the District Court. We have shown under Part I (*b*) of this brief that the venue was improperly laid in the Western District of Oklahoma. We have shown under Part I (*c*) of this brief that the District Court cannot en-

join a suit in the State Court. We have shown under Part II (*b*) that the State Supreme Court acted in a judicial capacity upon the appeal from the Corporation Commission, and that its decision is *res judicata* as to the validity of the order. *Oklahoma Gas and Electric Company* v. *Wilson & Company*, 146 Okla. 272.

The appellants have not shown in their Proposition No. I that the lower court erred in dismissing the bill of complaint for want of equity.

REPLY TO APPELLANTS' PROPOSITION NO. II.

Appellants' Proposition No. II does not show that the lower court committed any error in dismissing the bill of complaint for want of equity.

The appellants claim in their Proposition No. II that the order of the Corporation Commission compelled the appellant, Oklahoma Natural Gas Company, to perform a public service which had never been professed or undertaken by it and is therefore repugnant to the Fourteenth Amendment to the Constitution of the United States.

This, in substance, is the whole of the claim for federal jurisdiction in the case at bar. The appellants do not attempt to support their bill upon any grounds showing equitable grounds for relief. The allegation that the order of the Corporation Commission violated the Constitution does not show that the lower court erred in dismissing the bill for want of equity.

In *Northport Power & Light Co.* v. *Hartley, et al.*, 283 U. S. 568, at pages 569-570, this Court said:

> "Some, at least, of the constitutional objections to the laws of the State are disposed of by *Terrace* v. *Thompson*, 263 U. S. 197, but before they are reached

there arises the objection that no ground for equitable interference by the Courts of the United States is shown by the bill. The only injury alleged is the result of the suit in the State Courts. So far as appears that result will ensue only upon a decision against the appellant. It is an odd ground for an injunction against a suit that the suit may turn out against the party sued. If the action is based upon an unconstitutional law and if the trial court upholds it, still the appellant can protect its rights as fully in the State Courts as elsewhere. As it is put by Mr. Justice Moody speaking for a unanimous Court, 'It is safe to say that no case can be found where this court has deliberately approved the issuance of an injunction against the enforcement of an ordinance resting on state authority, merely because it was illegal or unconstitutional, unless further circumstances were shown which brought the case within some clear ground of equity jurisdiction.' *Boise Artesian Hot & Cold Water Co.* v. *Boise City*, 213 U. S. 276, 285; *Cavanaugh* v. *Looney*, 248 U. S. 453, 456. These cases relied on by the Court below are sufficient to sustain its conclusion."

The appellants have shown no error under their Proposition No. II by their argument that the order of the Corporation Commission was unconstitutional.

The appellants have fallen into error in their Proposition No. II in asserting that appellant, Oklahoma Natural Gas Co. was required to assume and perform a public service that it had never professed or undertaken to perform. The appellants admit (pp. 44-45, their brief) that the Corporation Commission had found that they had undertaken to furnish gas for use in Oklahoma City and vicinity; that the Supreme Court of Oklahoma made a similar finding; and that the lower court, in its opinion, made a similar finding. The appellants, continuing, say (p. 45 their brief):

"It may be conceded for the purpose of this discussion that if the Oklahoma Natural Gas Company had

actually undertaken to serve gas to consumers within Oklahoma City or within the city gates or measuring stations at Oklahoma City, it could not abandon such service without the permission of the Corporation Commission and that an order of that body requiring it to resume a public service once undertaken would be valid."

The finding of the Corporation Commission and the Supreme Court of Oklahoma are entitled to great weight on this question of fact. On September 2, 1924, the appellant, Oklahoma Natural Gas Co. applied to the Corporation Commission to change its industrial gas rates "on its general system" (R. 110). This was granted and these voluntary rates of First 100,000 cu. ft. per customer per month 38¢ per 1,000 cu. ft. net, all over 100,000 cu. ft. per customer per month 15¢ per 1,000 cu. ft. net, with a higher rate for the cities and towns served by the Oklahoma Natural Gas Co. directly, were put into effect on September 15, 1924 (R. 112).

In September, 1924, the measuring station was located at Hickory and Agnew Streets, Oklahoma City, and Wilson & Co.'s plant was located west of and outside of this measuring station and outside the city limits of Oklahoma City. At some date after September 1924 the measuring station was moved about 3,000 feet west and about 1,500 feet west of Wilson & Co.'s plant (R. 70). Oklahoma Natural Gas Co. had a six inch main in Ash Street, 450 feet south of Wilson & Co's engine room, throughout 1924, and sold a part of this, east of Wilson & Co's plant, to Oklahoma Gas & Electric Co. in April 1925 (R. 70-71). This main was connected with Wilson & Co.'s engine room and gas was delivered through this connection from and after December, 1924 (R. 73).

In September 1924, the appellant, Oklahoma Natural Gas Co., was professing to serve industrial gas on its "general system." Wilson & Co.'s plant was located on its general system and was therefore entitled to be served by it. It attempted to withdraw this service by moving the measuring station to a point west of Wilson & Co.'s plant. The moving of this measuring station was without permission of the Corporation Commission. The order of the Corporation Commission did no more than require "it to resume a public service once undertaken." This the appellants have conceded in their brief (page 45 quoted above). The Corporation Commission's order requiring them to resume a service would be valid.

The appellants cite *Oklahoma Natural Gas Co.* v. *Corporation Commission,* 88 Okla. 51, which was decided December 19, 1922, and therefore before Oklahoma Natural Gas Co. voluntarily established its industrial rates "on its general system" in September 1924. The case is therefore not in point.

Appellants also cite *In re Vance,* 115 Okla. 8, which was decided November 3, 1925. There was no evidence of the Industrial rates established by Oklahoma Natural Gas Co. in September, 1924, before the Court in the *Vance case,* and it therefore, is not in point.

The appellants having conceded that an order requiring appellant, Oklahoma Natural Gas Co. to resume a service once undertaken would be valid. There was no error in the District Court dismissing the bill for want of equity.

REPLY TO APPELLANTS' PROPOSITION NO. III.

Appellants' Proposition No. III does not show that the lower court committed any error in dismissing the bill of complaint for want of equity.

In appellants' Proposition No. III it is argued that the order of the Corporation Commission was "in contravention of section 10, Article I of the Constitution of the United States."

There is no "Assignment of Error" to cover this point and, therefore, will not be considered.

Rules of The Supreme Court of the United States, Rule 27, Par. 4.

REPLY TO APPELLANTS' PROPOSITION NO. IV.

The Appellants' Proposition No. IV does not show that the lower court committed any error in dismissing the bill of complaint for want of equity.

Appellants in their Proposition No. IV urge that:

> "The statutory three-judge court erred in holding that the complainants, Oklahoma Natural Gas Corporation and the trustees of the Oklahoma Natural Gas Company * * * did not have such interest in the controversy as would entitle them to an injunction herein." (Their Brief p. 63.)

In the first paragraph of their argument, under this proposition, appellants state:

> "* * * the three-judge court, in the instant case, *in the opinion* by Circuit Judge McDermott held that the Oklahoma Natural Gas Company had no substantial interest in the controversy, *We think this was error.*" (Brief 63.) (Italics ours.)

The law is well settled that the opinion of the Court is not a ruling subject to an exception nor upon which error may be assigned.

Stoody Co. v. *Milk Alloys,* 67 Fed.(2d) 807, 809, (C. C. A. 9).

Smart v. *Wright,* 227 Fed. 84, 85 (C. C. A. 8).

Childs v. *Williams,* 212 Fed. 151, 152 (C. C. A. 8).

Albany Perforated Wrapping Paper Co. v. *John Hoberg Co.,* 109 Fed. 589, 591 (C. C. A. 7).

Eureka County Bank v. *Clarke,* 130 Fed. 325, 326 (C. C. A. 9).

In the case at bar the appellants have not taken an exception to the opinion of the lower court, though they have attempted to assign the opinion as error. This attempted assignment of error conflicts with the well established rule that the opinion is not subject to an assignment of error.

Upon appeal this Court is only concerned with the correctness of the decree dismissing the bill for want of equity without regard to the reasons given in the lower court's opinion.

United States v. *Heinrichs,* 16 Fed.(2d) 112 (C. C. A. 9).

Clinton Mining & Mineral Co. v. *Cochran,* 247 Fed. 449 (C. C. A. 3).

City of Newark v. *Mills,* 35 Fed.(2d) 110 (C. C. A. 3). (Cert. denied, 281 U. S. 722.)

Lewis-Hall Iron Works v. *Blair,* 23 Fed.(2d) 972, (C. of A. of D. C.) (Cert. denied, 277 U. S. 592.)

City of St. Paul v. *Certain Lands,* 48 Fed.(2d) 805 (C. C. A. 8).

The statement that the Oklahoma Natural Gas Company had no interest in the controversy is found only in the opin-

ion of the lower court (R. 67). The only order of the District Court was that the bill of complaint be dismissed for want of equity (R. 83). The appellants have failed to show that there was a single ground for equity jurisdiction in the present suit.

Assuming for the purposes of argument that the District Court erred in the statement in its opinion, this Court will not reverse the decree of the lower court simply because that court may, in its opinion, have given a wrong reason for a right decision.

In *Boise Artesian Hot & Cold Water Co.* v. *Boise City*, 213 U. S. 276, this Court had before it a case that was on all fours with the case at bar. In affirming the lower court this Court said at page 287:

> "The circuit court dismissed the bill for entirely different reasons than those which have influenced us. We neither approve nor disapprove those reasons, nor intimate any opinion whatever upon the questions passed on by the circuit court. It would be superfluous formalism to reverse the decree of the court below and remand the case to that court, with instructions to dismiss the bill for the reasons given in this opinion, for that court has already dismissed the bill. Therefore, the decree of the court below is affirmed."

The appellants have failed to show in their Proposition No. IV that there was any error in the lower court in dismissing the bill for want of equity. The appellants in their bill and upon their proofs have failed to make a case cognizable in an equity court, and the order of the lower court dismissing the bill for want of equity was not error.

CONCLUSION.

We respectfully urge that this Court is without jurisdiction of this controversy upon direct appeal from the District Court in so far as the appellants attempt to enjoin the action of Wilson & Co., Inc., of Oklahoma in the State Court against appellant Oklahoma Gas and Electric Company, and its surety; and that there was no error in the decree of the District Court dismissing the bill of complaint for want of equity.

Respectfully submitted,

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Counsel for Appellees.

APPENDIX.

We are not printing Sections 19, 20, 21, 22, 23, 24 of Article IX of the Constitution of Oklahoma, for the reason that they are printed in the appendix to appellants' brief, pages 67-72.

CONSTITUTION OF OKLAHOMA.

ARTICLE IV.

DISTRIBUTION OF POWERS.

"SECTION 1. The powers of the government of the State of Oklahoma shall be divided into three separate departments: The Legislative, Executive, and Judicial; and except as provided in this Constitution, the Legislative, Executive and Judicial departments of government shall be separate and distinct, and neither shall exercise the powers properly belonging to either of the others."

ARTICLE VII.

JURISDICTION OF SUPREME COURT OF OKLAHOMA.

"SECTION 2. The appellate jurisdiction of the Supreme Court shall be co-extensive with the State, and shall extend to all civil cases at law and in equity, and to all criminal cases until a Criminal Court of Appeals with exclusive appellate jurisdiction in criminal cases shall be established by law. The original jurisdiction of the Supreme Court shall extend to a general superintending control over all inferior

courts and all commissions and boards created by law. The Supreme Court shall have power to issue writs of habeas corpus, mandamus, quo warranto, certiorari, prohibition, and such other remedial writs, as may be provided by law, and to hear and determine the same; and the Supreme Court may exercise such other and further jurisdiction as may be conferred upon it by law. Each of the Justices shall have power to issue writs of habeas corpus to any part of the State upon petition by or on behalf of any person held in actual custody, and make such writs returnable before himself, or before the Supreme Court, or before any District Court, or Judge thereof, in the State."

ARTICLE IX.

DEFINITIONS.

"SECTION 34. As used in this article, the term 'transportation company' shall include any company, corporation, trustee, receiver, or any other person owning, leasing or operating for hire, a railroad, street railway, canal, steam boat line, and also any freight car company, car association, express company, sleeping car company, car corporation, or company, trustee or person in any way engaged in such business as a common carrier, over a route acquired in whole or in part under the right of eminent domain, or under any grant from the government of the United States; the term 'rate' shall be construed to mean rate of charge for any service rendered, or to be rendered; the terms 'rate,' 'charge,' and 'regulation,' shall include joint rates, joint charges, and joint regulations, respectively; the term 'transmission company' shall include any company, receiver or other person, owning, leasing, or operating for hire any telegraph or telephone line; the term 'freight' shall be

construed to mean any property transported or received for transportation, by any transportation company. The term 'public service corporation' shall include all transportation and transmission companies, all gas, electric light, heat, and power companies, and all persons authorized to exercise the right of eminent domain, or to use or occupy any right of way, street, alley, or public highway, whether along, over, or under the same, in a manner not permitted to the general public; the term 'person' as used in this article shall include individuals, partnerships and corporations, in the singular as well as plural number; the term 'bond' shall mean all certificates or written evidences of indebtedness issued by any corporation and secured by mortgage or trust deed. The term 'frank' shall mean any writing or token issued by or under authority of a transmission company, entitling the holder to any service from such company free of charge.

The provisions of this article shall always be so restricted in their application as not to conflict with any of the provisions of the Constitution of the United States, and as if the necessary limitations upon their interpretation had been herein expressed in each case."

OKLAHOMA STATUTES.

Corporation Commission—Jurisdiction Extended—Public Utilities.

By an Act of the Fourth Legislature of Oklahoma, approved March 25, 1913 (Session Laws 1913, c. 93, p. 150; C. O. S. 1921, §§ 3462-3466; Okla. Stat. 1931, §§ 3617-3621), it was provided as follows, to-wit:

"An Act to extend the jurisdiction of the Corporation Commission over the rates, charges, services and practice

of water, heat, light and power companies, and to give said Commission general supervision over such utilities, and declaring an emergency.

Be It Enacted by the People of the State of Oklahoma:

SECTION 1. The term 'public utility,' as used in this act, shall be taken to mean and include every corporation, association, company, individual, their trustees, lessees, or receivers, successors or assigns, except cities, towns, or other bodies politic, that now or hereafter may own, operate, or manage any plant or equipment, or any part thereof, directly or indirectly, for public use, or may supply any commodity to be furnished to the public.

(*a*) For the conveyance of gas by pipe line.

(*b*) For the production, transmission, delivery, or furnishing of heat or light with gas.

(*c*) For the production, transmission, delivery or furnishing electric current for light, heat or power.

(*d*) For the transportation, delivery or furnishing of water for domestic purposes or for power.

The term 'Commission' shall be taken to mean Corporation Commission of Oklahoma. (C. O. S. 1921, § 3462; Okl. Stat. 1931, § 3617 with amendment in an unimportant particular.)

SECTION 2. The Commission shall have general supervision over all public utilities, with power to fix and establish rates and to prescribe rules, requirements and regulations, affecting their services, operation, and the management and conduct of their business; shall inquire into the management of the business itself, and the method in which same is conducted. It shall have full visitorial and inquisitorial power to examine such public utilities, and keep informed as to their general conditions, their capitalization, rates, plants, equipments, apparatus, and other property

owned, leased, controlled or operated, the value of same, the management, conduct, operation, practices and services; not only with respect to the adequacy, security and accommodation afforded by their service, but also with respect to their compliance with the provisions of this act, with the Constitution and laws of this state, and with the orders of the Commission. (C. O. S. 1921, § 3463; Okl. Stat. 1931, § 3618.)

SECTION 3. In addition to the powers enumerated, specified, mentioned or indicated in this act, the Commission shall have all additional implied and incidental powers which may be proper and necessary to carry out, perform and execute all powers herein enumerated, specified, mentioned, or indicated, and to punish as for contempt such corporation, association, company or individual, their trustees, lessees, receivers, successors and assigns, for the disobedience of its orders in the manner provided for punishment of transportation and transmission companies, by the Constitution and laws of this state. (C. O. S. 1921, § 3464; Okl. Stat. 1931, § 3619.)

SECTION 4. In case of the owner or operator of any public utility is engaged in carrying on any other business in connection with the operation of such public utility, the Commission may require the cost of the operation and gross revenues of such joint business to be kept in such form and manner as may be prescribed by the Commission so that the cost of the operation and gross revenues of the public utility may be ascertained. (C. O. S. 1921, § 3465; Okl. Stat. 1931, § 3620.)

SECTION 5. The Commission may, from time to time, adopt or promulgate, such orders, rules, regulations or requirements, relative to investigations, inspections, tests, audits, and valuations of the plants and properties relative to inspection and tests of meters as in its judgment may

be necessary and proper; provided, that under the provisions of this act, any public utility, corporation, association, company, individual, their trustees, lessees or receivers, successors, or assigns, may appeal from any order or finding or judgment of the Corporation Commission as provided by law in cases tried and heard before said Commission of transportation and transmission companies. (C. O. S. 1921, § 3466; Okl. Stat. 1931, § 3621.)

SECTION 6. For the preservation of the public health, peace and safety, an emergency is hereby declared to exist, by reason whereof this act shall take effect and be in force from and after its passage and approval."

STATUTES OF THE UNITED STATES.

JUDICIAL CODE, SECTION 51, AMENDED—VENUE STATUTE.

(R. S. § 739; Mar. 3, 1875, c. 137, § 1, 18 Stat. 470; Mar. 3, 1887, c. 373, § 1, 24 Stat. 552; Aug. 13, 1888, c. 866, § 1, 25 Stat. 433; Mar. 3, 1911, c. 231, § 51, 36 Stat. 1101; Sept. 19, 1922, c. 345, 42 Stat. 849; Mar. 4, 1925, c. 526, § 1, 43 Stat. 1264.)

"(*a*) Except as provided in sections 113 to 117 of this title, no person shall be arrested in one district for trial in another in any civil action before a district court; and, except as provided in sections 113 to 118 of this title, no civil suit shall be brought in any district court against any person by any original process or proceeding in any other district than that whereof he is an inhabitant; but where the jurisdiction is founded only on the fact that the action is between citizens of different States, suit shall be brought only in the district of the residence of either the plaintiff or the defendant.

(*b*) Any civil suit, action, or proceeding brought by or on behalf of the United States, or by or on behalf of any officer of the United States authorized by law to sue, may be brought in any district whereof the defendant is an inhabitant, or where there be more than one defendant in any district whereof any one of the defendants, being a necessary party, or being jointly, or jointly and severally, liable, is an inhabitant, or in any district wherein the cause of action or any part thereof arose; and in any such suit, action, or proceeding process, summons, or subpoena against any defendant issued from the district court of the district wherein such suit is brought shall run in any other district, and service thereof upon any defendant may be made in any district within the United States or the territorial or insular possessions thereof in which any such defendant may be found with the same force and effect as if the same had been served within the district in which said suit, action, or proceeding is brought. The word 'district' and the words 'district court' as used herein shall be construed to include the District of Columbia and the Supreme Court of the District of Columbia.

(*c*) Paragraphs (*b*) and (*c*) of this section shall be effective for a period of four years after September 19, 1922, after which paragraph (*a*) alone shall be and remain in full force and effect."

JUDICIAL CODE, SECTION 238, AMENDED—DIRECT APPEAL.

(March 3, 1891, c. 517, § 5, 26 Stat. 827; Jan. 20, 1897, c. 68, 29 Stat. 492; Apr. 12, 1900, c. 191, § 35, 31 Stat. 85; Apr. 30, 1900, c. 339, § 86, 31 Stat. 158; Mar. 3, 1909, c. 269, § 1, 35 Stat. 838; Mar. 3, 1911, c. 231, §§ 238, 244, 36 Stat. 1157; Jan. 28, 1915, c. 22, § 2, 38 Stat. 804; Feb. 13, 1925, c. 229, § 1, 43 Stat. 938.)

"A direct review by the Supreme Court of an interlocutory or final judgment or decree of a district court may be had where it is so provided in the following sections and not otherwise:

(1) Section 29 of Title 15.

(2) Section 682 of Title 18, where the decision of the district court is adverse to the United States.

(3) Section 380 of this title.

(4) So much of section 47 of this title as relates to the review of interlocutory and final judgments and decrees in suits to enforce, suspend, or set aside orders of the Interstate Commerce Commission other than for the payment of money.

(5) Section 217 of Title 7."

JUDICIAL CODE, SECTION 265—STAY IN STATE COURTS.

(R. S. § 720; Mar. 3, 1911, c. 231, § 265, 36 Stat. 1162.)

"The writ of injunction shall not be granted by any court of the United States to stay proceedings in any court of a State, except in cases where such injunction may be authorized by any law relating to proceedings in bankruptcy."

JUDICIAL CODE, SECTION 266, AMENDED—INJUNCTION BY THREE JUDGE COURTS.

(June 18, 1910, c. 309, § 17, 36 Stat. 557; Mar. 3, 1911, c. 231, § 266, 36 Stat. 1162; Mar. 4, 1913, c. 160, 37 Stat. 1013; Feb. 13, 1925, c. 229, § 1, 43 Stat. 938.)

"No interlocutory injunction suspending or restraining the enforcement, operation, or execution of any statute of a State by restraining the action of any officer of such State in the enforcement or execution of such statute, or in the enforcement or execution of an order made by an ad-

ministrative board or commission acting under and pursuant to the statutes of such State, shall be issued or granted by any justice of the Supreme Court, or by any district court of the United States, or by any judge thereof, or by any circuit judge acting as district judge, upon the ground of the unconstitutionality of such statute, unless the application for the same shall be presented to a justice of the Supreme Court of the United States, or to a circuit or district judge, and shall be heard and determined by three judges, of whom at least one shall be a justice of the Supreme Court or a circuit judge, and the other two may be either circuit or district judges, and unless a majority of said three judges shall concur in granting such application. Whenever such application as aforesaid is presented to a justice of the Supreme Court, or to a judge, he shall immediately call to his assistance to hear and determine the application two other judges: *Provided, however,* That one of such three judges shall be a justice of the Supreme Court, or a circuit judge. Said application shall not be heard or determined before at least five days' notice of the hearing has been given to the governor and to the attorney general of the State, and to such other persons as may be defendants in the suit: *Provided,* That if of opinion that irreparable loss or damage would result to the complainant unless a temporary restraining order is granted, any justice of the Supreme Court, or any circuit or district judge, may grant such temporary restraining order at any time before such hearing and determination of the application for an interlocutory injunction, but such temporary restraining order shall remain in force only until the hearing and determination of the application for an interlocutory injunction upon notice as aforesaid. The hearing upon such application for an interlocutory injunction shall be given precedence and shall be in every way expedited and be assigned for a hearing at the earliest practicable day after

the expiration of the notice hereinbefore provided for. An appeal may be taken direct to the Supreme Court of the United States from the order granting or denying, after notice and hearing, an interlocutory injunction in such case. It is further provided that if before the final hearing of such application a suit shall have been brought in a court of the State having jurisdiction thereof under the laws of such State, to enforce such statute or order, accompanied by a stay in such State court of proceedings under such statute or order pending the determination of such suit by such State court, all proceedings in any court of the United States to restrain the execution of such statute or order shall be stayed pending the final determination of such suit in the courts of the State. Such stay may be vacated upon proof made after hearing, and notice of ten days served upon the attorney general of the State, that the suit in the State courts is not being prosecuted with diligence and good faith. The requirement respecting the presence of three judges shall also apply to the final hearing in such suit in the district court; and a direct appeal to the Supreme Court may be taken from a final decree granting or denying a permanent injunction in such suit."

SUPREME COURT OF THE UNITED STATES.

No. 832.—October Term, 1933.

Oklahoma Gas and Electric Company, Oklahoma Natural Gas Company, W. T. Phillips, Jr., et al., etc., Appellants, *vs.* Oklahoma Packing Company, formerly Wilson & Co., Inc., of Oklahoma, Wilson & Co., Inc., of Oklahoma, et al.	Appeal from the District Court of the United States for the Western District of Oklahoma.

[May 21, 1934.]

Mr. Justice Stone delivered the opinion of the Court.

This is an appeal under § 266 of the Judicial Code from a decree of the District Court for Western Oklahoma, three judges sitting, which dismissed the cause for want of equity jurisdiction. — F. Supp. —. The suit was brought by Oklahoma Natural Gas Company and Oklahoma Gas & Electric Company, two public service companies, against appellees, Wilson & Company, Inc., now Oklahoma Packing Company, a private business corporation, the State Corporation Commission, and the Attorney General of the State, to enjoin enforcement of an order of the Commission. The order, which directed the Oklahoma Natural Gas Company to supply Wilson & Company with natural gas at a prescribed rate, was assailed as an infringement of the due process and contract clauses of the Federal Constitution on the ground that it imposed on the Gas Company a duty to serve which it had never undertaken to perform, and impaired a contract between the two gas companies with respect to the distribution of gas by them to consumers in the vicinity of the plant of Wilson & Company. The order, which was made upon petition of Wilson & Company to the State Commission, directed that the Oklahoma Natural Gas Company be required to supply it with gas at a lower rate than it had been paying for gas supplied by the Oklahoma Gas & Electric Company which

that company purchased from the Natural Gas Company for distribution.

On appeal the state supreme court affirmed the order. 146 Okla. 272. Pending the appeal, supersedeas bonds were given which suspended the order and Wilson & Company continued to take its gas supply from the Oklahoma Gas & Electric Company at the higher rate. In the meantime, while the petition to review the order was pending before the state supreme court, and before the present suit was brought, the Oklahoma Natural Gas Company acquired the properties of the Oklahoma Gas & Electric Company and a new industrial rate for natural gas supplied by it was put into effect by order of the Commission.

Upon affirmance by the state supreme court of the Commission's earlier order, Wilson & Company brought suit in the state district court, joining as defendants the Oklahoma Gas & Electric Company and the sureties on the supersedeas bonds, to recover the amount paid for gas in excess of the rate prescribed by the earlier order of the Commission. That suit was defended upon the ground, among others, of the constitutional invalidity of the order. Judgment was given for Wilson & Company, from which an appeal was taken and is now pending in the state supreme court.

Following this judgment the present suit was brought upon a bill of complaint which set up the invalidity of the order, alleged that the action of the state supreme court in affirming it was legislative not judicial, see *Oklahoma Gas & Electric Company* v. *Wilson & Company, Inc.*, 54 F. (2d) 596, and prayed an injunction restraining appellees from taking any steps to enforce it. The court below construed this as asking both that the state officers be enjoined from enforcing the order and that Wilson & Company be restrained from prosecuting its pending suit in the state courts to recover the excess payments for gas. Upon the trial, the court below made its finding, not assailed here, that no penalties could be imposed for non-compliance with the challenged order, as it had been suspended by supersedeas in the proceedings to review it before the Supreme Court of Oklahoma, and while they were pending it had become inoperative by reason of the order of the Commission establishing the new rate. It found that "there is no suggestion in the record of any intention on the part of any of the officials of Oklahoma to undertake to impose any statutory penal-

ties for failure to comply with the order". The court concluded that there was no basis for relief by injunction against state officials, and that the only issue left in the case was the right asserted by appellees to enjoin prosecution of the suit of Wilson & Company in the state courts, and that as the alleged invalidity of the Commission's order had been interposed as a defense in that suit and had been passed upon by the state court, there was no occasion for relief by a federal court of equity.

The appellants insist here, as they did below, that the district court of Oklahoma is without jurisdiction to pass upon the issue of the invalidity of the order, since by § 20, Art. 9 of the state constitution, exclusive jurisdiction to review or set aside an order of the Commission is conferred on the state supreme court. See *Pioneer Tel. & Tel. Company* v. *State*, 40 Okla. 417. We are asked on this appeal to sustain the equity jurisdiction of the three judge court to restrain the prosecution of the suit at law in the state courts, upon the ground that appellants are without adequate legal remedy to protect themselves from the exactions of the unconstitutional order.

By § 266 of the Judicial Code, suits, in which an interlocutory injunction is sought and pressed, to restrain any state officer from enforcing or executing a state statute or an order of a state commission, on the ground of its unconstitutionality, are required to be tried before a court of three judges. The section provides that "a direct appeal to the Supreme Court may be taken from a final decree granting or denying a permanent injunction in such suit". Our jurisdiction to hear the present appeal is challenged and as this is the only provision authorizing the appeal to this Court, it is necessary at the outset to determine whether this is "such suit".

The procedure prescribed by § 266 may be invoked only if the suit is one to restrain the action of state officers. *Ex parte Public National Bank*, 278 U. S. 101; *Ex parte Collins*, 277 U. S. 565. That this condition is vital is sufficiently indicated by reference to the part played by *Ex parte Young*, 209 U. S. 123, in inducing enactment of the section.[1] Hence the cause of action alleged against Wilson & Company, although within the jurisdiction of the district court, is subject to this extraordinary procedure, and

[1]See 42 Cong. Rec. 4846, *et seq.*; 45 *id.* 7252, *et seq.*; Hutcheson, A Case for Three Judges, 47 Harvard Law Rev. 795, 805.

appealable directly to this Court, if at all only because it is incidental to the relief prayed against the state officers. See *Pittsburgh & West Virginia Ry. Co.* v. *United States,* 281 U. S. 479. Whether it is so incidental we need not inquire, for we conclude that the case against the state officers was not one within the appellate jurisdiction conferred upon this Court by § 266 so as to bring either that case or its incidents before us for decision. Compare *Levering & Garrigues Co.* v. *Morrin,* 289 U. S. 103; *Clark* v. *Wooster,* 119 U. S. 322, 325.

The allegations against appellee officers, it is true, present on their face every prerequisite to three judge action. But when it became apparent, as it did upon the final hearing, that there was never any basis for relief of any sort against the state officers, and that the only matter in controversy was the right of Wilson & Company to recover the alleged excess payments for gas, there was no longer any occasion for proceeding under § 266. The issue is not one of the federal jurisdiction of the district court, see *Healy* v. *Ratta,* 291 U. S. —; *Ex parte Poresky,* 290 U. S. 30, 31; compare *Rice & Adams Corporation* v. *Lathrop,* 278 U. S. 509, 514, with *Smith* v. *Wilson,* 273 U. S. 388, and *Ex parte Hobbs,* 280 U. S. 168; but whether a final hearing by three judges was prescribed by the section, and hence whether this Court has jurisdiction to hear the appeal. *Smith* v. *Wilson, supra.*

The three judge procedure is an extraordinary one, imposing a heavy burden on federal courts, with attendant expense and delay. That procedure, designed for a specific class of cases, sharply defined, should not be lightly extended. *Ex parte Collins, supra,* at 569. The limitations of the statute would be defeated were it enough to keep three judges assembled that a plaintiff could resort to a mere form of words in his complaint alleging that the suit is one to restrain action of state officers, with no support whatever in fact or law. Compare *Pacific Elec. Ry. Co.* v. *Los Angeles,* 194 U. S. 112, 118; see also *Wilderman* v. *Roth,* 17 F. (2d) 486. The restrictions placed upon appellate review in this Court by the jurisdictional act of February 13, 1925, would likewise be measurably impaired were groundless allegations thus to suffice. See *Smith* v. *Wilson, supra,* at 390; compare *United States* v. *Alaska S. S. Co.,* 253 U. S. 113. When it becomes apparent that the plaintiff has no case for three judges, though they

may have been properly convened, their action is no longer prescribed and direct appeal here must fail as well in this case as where the plaintiff does not press his injunction, *Smith* v. *Wilson, supra,* or his constitutional attack. Compare *Ex parte Hobbs, supra.*[2]

Although without jurisdiction to hear the merits of the appeal this Court, in the exercise of its appellate jurisdiction, has authority to give such directions as may be appropriate to enforce the limitations of § 266 and to conform the procedure to its requirements. And we may frame our order in a way that will save to the appellants their proper remedies. *Gully* v. *Interstate Natural Gas Co.*, 291 U. S. —; see *Gulf, Colorado & Santa Fe R. R. Co.* v. *Dennis,* 224 U. S. 503; compare *United States* v. *Anchor Coal Co.,* 279 U. S. 812.

By mistakenly appealing directly to this Court appellants have lost their opportunity to have the decree below reviewed on its merits, as the time for appeal to the Circuit Court of Appeals has expired. Compare *Healy* v. *Ratta,* 289 U. S. 701; 291 U. S. —. We might now terminate the litigation by dismissing the appeal without more, and it would be proper to do so had the correct procedure under § 266 been more definitely settled at the time the appeal to this Court was attempted. But in the circumstances, it is appropriate that the decree below should be vacated and the cause remanded to the district court for further proceedings to be taken independently of § 266 of the Judicial Code. *Gully* v. *Interstate Natural Gas Co., supra.*

Costs will be awarded against the appellants. See *Mansfield, Coldwater & Lake Michigan Railway Company* v. *Swan,* 111 U. S. 379, 387.

So ordered.

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[2]The authorities are collected and discussed in Bowen, When Are Three Federal Judges Required, 16 Minnesota Law Rev. 1, 33-39.

A true copy.

Test:

Clerk, Supreme Court, U. S.